LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 9 1968
JOHN F. DAVIS, CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. 73

ROBERT NEWTON GARDNER, JR.,
Petitioner,

—v.—

CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO

PETITION FOR CERTIORARI FILED JUNE 3, 1967
CERTIORARI GRANTED MAY 6, 1968

Supreme Court of the United States

OCTOBER TERM, 1968

No. 73

ROBERT NEWTON GARDNER, JR.,

Petitioner,

—v.—

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO

INDEX

	Page
Letter from Robert Newton Gardner, Jr. to Clerk of the Superior Court of the State of California, in and for the County of San Luis Obispo, dated September 17, 1966	1
Petition for writ of mandate or injunction filed September 23, 1966 in the Superior Court	2
Memorandum and order of the Superior Court dated September 26, 1966 refusing to file the petition for writ of mandate or injunction	19
Motion to vacate order denying filing of petition filed October 6, 1966	20
Order granting motion to vacate order, etc., dated October 7, 1966	26
Order for production of patient, dated October 21, 1966	27
Motion for appointment of counsel filed December 6, 1966	28
Order appointing the Public Defender as counsel, dated December 6, 1966	29

Page

Memorandum of decision, J. Timothy I. O'Reilly, dated February 15, 1967 ____ 31

Notice of motion and motion under informa pauperis provision for free transcript of all proceedings had hereof filed March 1, 1967 ____ 32

Order denying motion, dated March 1, 1967 ____ 43

Petition for writ of certiorari directed to the Superior Court of the State of California in and for the County of San Luis Obispo, Case No. 5101, filed March 14, 1967 in the District Court of Appeal of the State of California, Second Appellate District ____ 44

Order of The Court of Appeal of the State of California, Second Appellate District denying the petition for writ of certiorari, dated March 28, 1967 ____ 53

Petition for hearing re: denial of certiorari filed in the Supreme Court of the State of California April 24, 1967 ____ 54

Order of the Supreme Court of the State of California denying hearing after judgment by the Court of Appeal, filed May 10, 1967 ____ 62

Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari, dated May 6, 1968 ____ 63

Name Robert Newton Gardner, Jr.
Box E. A-28381, Los Padres, California
Date September 17, 1966

Clerk of the Court
Superior Court
County Courthouse
San Luis Obispo County
San Luis Obispo, California

5101

Re: In the matter of ROBERT GARDNER on mandamus -vs- H. V. FIELD, et al.

Dear Sir:

I am enclosing an original and one copy of my petition for writ of mandate or injunction for the Court.

Also enclosed is an extra copy marked petitioner's copy. Would you be so kind as to mark that copy as "Received" and affix the number assigned thereto and return to me for my record.

Attached to the above entitled petition is a motion for leave with affidavit to proceed in forma pauperis. I know that I do not have sufficient funds to pay fees for mandamus. In the past however I have had institutional statements show a false high balance. This is intentional in most cases and a failure to carry the necessary bookkeeping forward is just one more of many attempts to roadblock or foreclose proper access to the courts.

It is therefore respectfully requested that upon any statement being submitted by respondents showing a higher balance than allowed for forma pauperis, that it be returned for verification under penalty of perjury with the date of last accounting marked thereon.

Thank you for your courtesy and understanding in this matter.

Respectfully yours,

/s/ Robert Newton Gardner, Jr.

ROBERT NEWTON GARDNER, JR.
A-28381
California Mens Colony
East Facility
Los Padres, California

PETITIONER IN PROPRIA PERSONA

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

Civil No. 5101

[File endorsement omitted in printing]

ROBERT NEWTON GARDNER, JR.,
PETITIONER AND PLAINTIFF

-vs-

H. V. FIELD, Superintendent, California Mens Colony, Los Padres, California; H. A. SCOTT, CC II, California Mens Colony, Los Padres, California; R. R. LUCAS, Prison Records Officer, California Mens Colony, Los Padres, California; SERGEANT D. E. MEYERS, Receiving and Release, California Mens Colony, Los Padres, California; and WALTER DUNBAR, Director of the California Department of Corrections, State of California, RESPONDENTS AND DEFENDANTS

PETITION FOR WRIT OF MANDATE OR INJUNCTION—
Filed September 23, 1966

TO THE HONORABLE PRESIDING JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN LUIS OBISPO

Photocopy, Original returned to Petitioner 9-27-66)

PETITION FOR WRIT OF MANDAMUS TO COMPEL RESPONDENTS TO ALLOW PETITIONER MEANINGFUL ACCESS TO THE COURTS

The petition of ROBERT NEWTON GARDNER, JR., respectfully shows:

I

This Court has jurisdiction to issue its writ of mandamus under the California Code of Civil Procedure, sections 1103, 1094.5, and section 1084, et seq.; and, this Court has jurisdiction to issue its writ of injunction under the California Code of Civil Procedure, section 525, et seq. Further jurisdiction is conferred upon this Court as to both writs under the Due Process and Equal Protection Clauses of both the California and Federal Constitutions.

II

That your petitioner ROBERT NEWTON GARDNER, JR. a state prisoner presently incarcerated in the California Mens Colony, Los Padres, California, within the jurisdiction of this Court, and as such a prisoner has a federal civil and constitutional right to prepare, present, and prosecute various writs and actions in the California and Federal Courts. That right includes a meaningful access to the courts.

III

That petitioner does not have a plain, speedy, and adequate remedy in the ordinary course of law and the relief sought is the proper relief under the special circumstances of this case.

IV

This is a civil complaint seeking a writ of mandamus or injunction to restrain defendants from enforcement of an unconstittuional application of regulations or local custom and to compel defendants to allow petitioner to prepare and present legal documents and to have a meaningful access to the courts.

V

That petitioner has a substantial right to prepare and present writs and other legal actions seeking redress in the various courts, and that petitioner has a constitutional right to a meaningful access to the courts.

VI

That the respondents-defendants, H. V. FIELD, Superintendent, R. R. LUCAS, Prison Records Officer, H. A. SCOTT, CC II, D. E. MEYERS, Receiving and Release Sergeant, each of the California Mens Colony, East Facility, Department of Corrections, Los Padres, California; and WALTER DUNBAR, as Director of the Department of Corrections, State of California, have been duly appointed to, and now holds and enjoys, the offices and positions as above listed.

VII

That it was and is the duty of the said respondents to obey the laws and to respect and enforce the constitutional mandates of both the California and Federal Governments. All State officials upon taking office swear to obey the laws and the constitutions with the Federal Constitution the supreme law of the land. The issues hereinafter presented clearly show that the petitioner has been and is being presently denied his Federal Civil and Constitutional Rights. The wilful and knowing acts of the respondents show a reckless and wanton disregard of the petitioner's federal civil and constitutional rights while the respondents, and each of them, are aware that their acts may constitute federal criminal violations under Title 18, sections 241 and 242.

VIII

That the facts of this case, briefly stated, are as follows:

The petitioner during the past three years has prepared and presented various actions to the courts seeking redress and he has purchased and he has been afforded in forma pauperis various court records, transcripts, sample,

petitions, and the like, from a number of state and federal courts. Moreover, the petitioner has obtained numerous photographic copies of important documents, exhibits, letters, and asserted legal instruments, each of the aforesaid have been obtained with the consent and the authority of the Superintendent in charge of the institution then housing the petitioner. (See Institution Mail Records, Trust Office Records, Court letters, copies of petitioner's letters, and property receipts issued to the petitioner. Each of the above retained by the respondents and not now accessable to the petitioner.)

It is the contention of the petitioner that the records that he has accumulated will show wilful and knowing use of perjury by the prosecution, denial of due process and equal protection of the law in many forms, and a flagrant denial of petitioner's federal civil and constitutional rights. The petitioner has been and is presently attempting to prepare and present a proper writ of habeas corpus on the merits of the above issues.

On August 18, 1966, Judge Leon R. Yankwich, United States District Court, Southern District, Central Division, granted the petitioner leave to prosecute, in forma pauperis and in propria persona, a civil rights action for damages in Civil Case Number 66-1334-LY. At that time the numerous records, exhibits, and the like, as above stated, were referred to as future exhibits available to the court in the matter of the the then and now pending civil complaint, and each exhibit was the lawful property and in the possession of the petitioner.

Several days subsequent to the filing of that complaint the petitioner was transferred, without notice or adequate time to prepare and pack his legal records, from the California Medical Facility, Vacaville, California to the California Mens Colony, Los Padres, California. All of the petitioner's needed records, transcripts, exhibits, and other legal material, so necessary to properly prosecute and sustain his cause, have either been intentionally misdirected, lost, or otherwise denied to the petitioner. The petitioner is informed and believes, and therefore alleges that the respondents have access to and the possession and control of said records, legal material, and the like. More-

over, the respondents have the present ability to produce and to allow the petitioner to retain the records and legal material necessary to prosecute and sustain his cause, and to afford him a meaningful access to the courts as secured to him under both the State and Federal Constitutions.

The petitioner has on each day, allowable by regulation or custom, demanded that he be afforded his needed legal records and legal material and for the past 18 days, notwithstanding said demands, the respondents refused and still continue to refuse, to perform their duty, to wit, the issuance of the rightful, lawful, and necessary legal records and material to afford the petitioner his constitutional right to seek redress and have a meaningful access to the courts.

IX

That petitioner is informed and believes, and therefore alleges, that the illegal and unconstitutional acts of the respondents, and each of them, has been and will continue to be a wilful and intentional action that is a direct result of the petitioner seeking to enforce his federal civil and constitutional rights.

X

That petitioner is presently and will continue to be involved in the pending civil rights action heretofore set forth and also other remedies seeking legal redress. The records, legal material, exhibits, and the like, presently denied petitioner, are needed and necessary to have adequate preparation, presentation, and access to the courts. That many of the items, exhibits, and other instruments, are originals and not replaceable. The denial, loss, destruction, or misdirection of the material will result in irreparable damage to the cause of petitioner.

XI

That it is the duty and responsibility of the California Courts to interpret the law and the Constitutions in the regulation of the internal affairs of the California prison system. Moreover, the petitioner must exhaust state reme-

dies prior to petitioning the federal courts. The petitioner has heretofore shown and set forth facts showing the issuance of the writ is indispensable to the enforcement of the petitioner's rights and the failure to act will result in irreparable damage to the cause of the petitioner.

XII

The petitioner has shown by this his verified petition that:

1. It is the duty of the respondents to perform.
2. The present ability of respondents to comply.
3. Numerous demands have been made by the petitioner.
4. The acts are an abuse of discretion.
5. Irreparable damage will result from the failure of of the court to act.
6. The petitioner has a substantial and constitutional right to prepare and present various writs seeking redress and to have a meaningful access to the Courts.
7. The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.
8. Petitioner has annexed to this petition the writ form required under Rules 56.5 and 201 (f) of the California Rules of Court.
9. The Petitioner has annexed to this petition a proper motion with affidavits for leave to proceed in forma pauperis.
10. It is the direct acts of the respondents that cause petitioner to be unable to present complete records, information, numbers, dates, and any exhibit that may be needed in this petition or in any petition.

WHEREFORE, your petitioner prays that a writ of prohibitory injunction may issue out, under the seal of this Court, directed to the said respondents, H. V. FIELD, Superintendent, R. R. LUCAS, Prison Records Officer, H. A. SCOTT, CC II, D. E. MEYERS, Receiving and Release Sergeant, each of the aforesaid of the California

Mens Colony, East Facility, Los Padres, California, and WALTER DUNBAR, Director of Corrections, State of California, commanding them forthwith to issue and deliver to your petitioner his court records, transcripts, exhibits, legal material, and all property as authorized by the Superintendent of the sending institution, and further restrain respondents from subjecting petitioner to threats, harrassment, and oppression for lawfully seeking to enforce his constitutional right to petition the courts for review.

Petitioner further prays for stay of respondents order, regulation, or custom, and thereby allow petitioner to receive and retain in his possession all legal documents, material, and property as aforesaid pending judgment of this court as it is in the best interest of the public in safeguarding the constitutional rights of the individual citizen.

Moreover, as an alternative, your petitioner prays that there may be issued against the said respondents, and each of them, an alternative writ of mandamus, returnable in 10 days, compelling the respondents to perform the acts as above prayed for or to show cause, including proper service upon petitioner, why they should not do so. That upon final hearing said injunction or mandate be made perpetual, and for such other and further relief as to this Court may seem just in the safeguarding of petitioner's constitutional rights.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
Petitioner in propria persona

[*Duly sworn to by Robert Newton Gardner, Jr. jurat omitted in printing (all in italics)*]

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO
(Court)

No. .....
(To be supplied by Clerk of the Court)

ROBERT N. GARDNER, JR., (PETITIONER)

vs.

H. V. FIELD, Superintendent, California Mens Colony, East Facility, et al. (RESPONDENT)

Petition for Writ of MANDAMUS OR INJUNCTION
(Title of writ)

Name of person in custody:

.....

(If other than petitioner).

Relationship of petitioner to person in custody: .....

.....

INSTRUCTIONS—READ CAREFULLY

Set forth in concise form the answers to each applicable question. If you do not know the answer to any question, you should so state. If necessary, you may finish the answer to a particular question on an additional blank page, but make it clear to which question any such continued answer refers.

You should exercise care to assure that all answers are true and correct. Since the petition contains a verification, the making of a statement which you know is false may result in a conviction for perjury.

Approved by the Judicial Council of California for use under Rules 56.5 and 201 (f) of the California Rules of Court [as adopted effective Jan. 1, 1966].

When the petition is filed with the Superior Court or judge thereof, only the original must be filed unless additional copies are required by local court rules.

When the petition is filed with the District Court of Appeal or justice thereof, an original and three copies must be filed.

When the petition is filed with the Supreme Court or justice thereof, an original and ten copies must be filed.

In addition, the law requires the service of a copy of the petition on the district attorney, city attorney or city prosecutor in certain cases (Pen. Code § 1475, Gov. Code § 72193).

Petitioner should attach all relevant records or documents supporting his claims.

1. ROBERT NEWTON GARDNER, JR. in whose be-
(Name of person in custody)
half the writ is applied for is confined or restrained of his liberty at CALIFORNIA MENS COLONY,
(Place of detention)
EAST FACILITY, LOS PADRES, CALIFORNIA.
by H. V. FIELD, Superintendent

.....

(Name of person or persons having custody—If names not known describe such person or persons)

.....

2. Name and location of court under whose process person is confined:

Superior Court, County of Orange, California

.....

.....

3. Nature of the court proceeding (e.g., criminal case, commitment for narcotics addiction, insanity, or mentally disordered or abnormal sex offender) and the case number, if known, resulting in the confinement:

Possession of Narcotics, violation 11500 H & S Code

.....

.....

4. The date of judgment, order or decree for confinement and its terms:

   Feb. 1960, continuous incarceration since that date.

   .....

5. What plea was entered in the above proceeding? (E.g., guilty, not guilty, not guilty by reason of insanity, nolo contendere, etc.)
   Plea of guilty

6. Check whether trial or hearing was by
   (a) ☐ A jury
   (b) ☒ A judge without a jury

7. Was an appeal taken? No

8. If you answered "yes" to (7), list

   (a) The name of each court to which an appeal was taken:

   i .....
   ii .....
   iii .....

   (b) The result in each such court:

   i .....
   ii .....
   iii .....

   (c) The date of each such result and, if known, citations of any written opinions or orders entered:

   i .....
   ii .....
   iii .....

9. If the answer to (7) was "no" state the reasons for not so appealing:

   At that time no appeal would lie from plea of guilty

   .....

10. State concisely the grounds on which you based your allegation that the imprisonment or detention is illegal:

(a) The judgment of the case or the imprisonment is not in question.

(b) .....

(c) .....

11. State concisely and in the same order the facts which support each of the grounds set in (10):

(a) This is a petition for writ of mandate and the facts and issues are presented in the annexed petition.

(b) .....

(c) .....

12. Have any other applications, petitions or motions been filed or made in regard to the same detention or restraint? yes

13. If you answered "yes" to (12), list with respect to each petition, motion or application:

(a) The specific nature thereof:

i All records, exhibits, past data, and the like involving prior actions have been denied me.

ii .....

iii .....

iv .....

(b) The name and location of the court in which each was filed:

i See 13. (a)

ii .....

iii .....

iv .....

(c) The disposition thereof:

i .....

ii See 13 (a)

iii .....

iv .....

(d) The date of each such disposition:

i .....

ii See 18 (a)

iii .....

iv .....

(e) If known, citations of any written opinions or orders entered pursuant to each such disposition:

i See 18 (a)

ii .....

iii .....

iv .....

14. Has any ground set forth in (10) been presented to this or any other court, state or federal, in any petition, motion or application? No.

15. If you answered "yes" to (14) identify:

(a) Which grounds have been previously presented:

i .....

ii .....

iii .....

(b) The proceedings in which each ground was raised:

i .....

ii .....

iii .....

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) .....

.....

(b) .....

.....

(c) .....

.....

17. In the proceeding resulting in the confinement complained of, was there representation by an attorney at any time during the course of:

(a) The proceedings prior to trial? .....

(b) The trial or hearing? .....

(c) The sentencing or commitment? .....

(d) An appeal? .....

(e) The preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction? .....

.....

18. If you answered "yes" to one or more parts of (17), list the name and address of each such attorney and the proceeding in which he appeared:

(a) .....

.....

(b) .....

.....

(c) .....

.....

19. Is the person in custody presently represented by an attorney in any matter relating to this confinement?

.....

If so, state the attorney's name and address: .....

.....

20. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

This is the proper court to seek the relief prayed for under the circumstances of this case. (See attached petition for mandate) .....

.....

.....

.....

I, the undersigned, say:

I am the petitioner in this action; the above document is true of my own knowledge, except as to matters that are stated in it on my information and belief, and as to those matters I believe it to be true.

Executed on September 17th, 1966 at Los Padres, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Robert Newton Gardner, Jr.
Petitioner in propria persona

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

Civil No. ———

ROBERT NEWTON GARDNER, JR., PETITIONER

- vs -

H. V. FIELD, Superintendent, et al., RESPONDENTS

PETITION FOR WRIT OF MANDATE OR INJUNCTION

PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner ROBERT NEWTON GARDNER, JR. asks leave to file the attached Petition for Writ of Mandate without the prepayment of costs and to proceed in forma pauperis. The petitioner's affidavit in support of this petition is attached hereto.

DATED, September 17th, 1966, Los Padres, California

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Petitioner in propria persona

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

Civil No. ———

ROBERT NEWTON GARDNER, JR., PETITIONER

-*vs*-

H. V. FIELD, Superintendent, et al., RESPONDENTS

PETITION FOR WRIT OF MANDATE OR INJUNCTION

AFFIDAVIT

AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN LUIS OBISPO)

I, ROBERT NEWTON GARDNER, JR., being aware of the penalty of perjury and according to law, depose and say that I am the petitioner in the above entitled cause and, in support of my application for leave to proceed without being required to prepay costs and fees, state:

1. I am a citizen of the United States and California.
2. Because of my poverty I am unable to pay the cost of said cause.
3. I am unable to give security for same.
4. I believe I am entitled to the redress and relief that I seek in said cause.
5. I am a prisoner confined in the California State Prison system and have been so confined for over the past six years.
6. The nature of said cause is briefly stated as follows:

I have been and I am presently being denied my legal records, transcripts, exhibits, and property,

necessary to prepare and present petitions seeking redress and as a result thereof I am being denied a meaningful access to the courts. This is a civil action requesting writ of mandamus or injunction against those responsible.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Petitioner and affiant

I, the undersigned, say:

I am the petitioner in this action; the above document is true of my own knowledge, except as to matters that are stated in it on my information and belief, and as to those matters I believe it to be true.

Executed on September 17th, 1966, Los Padres, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.

[Affidavit of Service by Mail (omitted in printing)]

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

No. 5101

[File endorsement omitted in printing]

In the Matter of the Application of
ROBERT NEWTON GARDNER, JR.,
For Writ of Habeas Corpus

MEMORANDUM—September 26, 1966

Petitioner seeks Habeas Corpus.

The petition is not on a form approved by the Judicial Council.

Such forms are free for the asking at the institution in which the petitioner is detained.

Failure to file a petition seeking relief with respect to a petitioner's detention on a form approved by the Judicial Council is grounds for the Clerk refusing to file the petition. (California Rules of Court, Sections 201 (f) and (g).)

The Clerk is ordered to refuse filing to the petition forwarded by petitioner, and to return said petition to the petitioner with a copy of this Memorandum.

If and when a petition is filed on a form approved by the Judicial Council, the Court will give it such consideration as its allegations may require.

DATED: September 26, 1966.

/s/ Richard F. Harris
Judge of the Superior Court

Sept. 27, 1966. Copy mailed to the Petitioner.

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

No. 5101

[File endorsement omitted in printing]

In the Matter of the Application of
ROBERT NEWTON GARDNER, JR.,
For Writ of Habeas Corpus or Mandate

MOTION TO VACATE ORDER DENYING FILING OF PETITION

The petitioner ROBERT NEWTON GARDNER, JR. respectfully moves this Court for an Order to vacate its previous Order to refuse filing of the above entitled and numbered petition, said Order entered September 26, 1966, and rendered by the Honorable Richard F. Harris, Judge of the Superior Court.

The Motion herein of the petitioner and his reasons for granting said motion are as follows:

I

This Court has jurisdiction herein to grant petitioner's motion to vacate under California Code of Civil Procedure, section 663, and further authority as stated in the case of *In Re Robinson* (1952), 112 C.A. 2d 246, which clarifies the circumstances and procedure in the instant case.

II

The facts of this case, briefly stated, are as follows:

1. The petitioner presented the above entitled and numbered petition to this Court on September 17, 1966, and the petition was entitled Petition for Writ of Mandamus or Prohibitory Injunction.

2. The Clerk of the Court filed that petition as it was presented on September 23, 1966.

3. On September 26, 1966, the Honorable Richard F. Harris termed that petition a writ of habeas corpus and

issued a Memorandum Order, in case number 5101, that the Clerk is ordered to refuse filing the petition and return said petition to the petitioner.

4. The full wording of the Memorandum Order as above set forth is as follows:

"Petitioner seeks Habeas Corpus.

The petition is not on a form approved by the Judicial Council.

Such forms are free for the asking at the institution in which the petitioner is detained.

Failure to file a petition seeking relief with respect to a petitioner's detention on a form approved by the Judicial Council is grounds for the Clerk refusing to file the petition. (California Rules of Court, Sections 201 (f) and (g).)

The Clerk is ordered to refuse filing to the petition forwarded by petitioner, and to return said petition to the petitioner with a copy of this Memorandum.

If and when a petition is filed on a form approved by the Judicial Council, the Court will give it such consideration as its allegations may require.

DATED: September 26, 1966."

III

It must be assumed that the Court read the petition and, therefore, the petitioner must state that the Order of the Court is erroneous and based on its own false statements, and as such the proceeding had in this matter was sham.

IV

Reason for the statements made in paragraph III are as follows:

1. On Page 8, lines 5 to 7 of the petition number 5101 the petitioner stated clearly that, "Petitioner has annexed to this petition the writ form required under Rules 56.5 and 201 (f) of the California Rules of Court.

2. On pages 10 to 14 of that petition the writ form as above stated was incorporated.

3. The reasons showing why the petitioner was unable to fully answer all questions on that writ form were fully set forth in the Supplement to that Form.

4. It is clear that the Judicial Council in its annual report to the Governor in 1964 wherein the Judicial Council set forth the reasons and the intent behind the adapted Rules 56.5 and 201 (f), that the writ form was to be supplemented if need be and that the form was for obtaining proper information, but did not restrict the supplementing the new writ form.

5. Special circumstances were set forth in the petition showing the necessity to supplement the writ form under 201 (f).

V

It has come to the attention of the petitioner since the presentation of his petition, and it is common knowledge among the prisoners of this institution and it is now the contention of the petitioner, that collusion between this Court and the Institution exists in the wilful and knowing denial of a meaningful access to the Courts, among other constitutional rights, and a wanton, malicious, and sytematic policy to oppress and frustrate all attempts by prisoners in this institution that seek to enforce their federal civil and constitutional rights.

Upon request the petitioner will support the above statement with numerous witnesses, documents, depositions, and the like.

VI

The Court was and or now is aware that the summary order denying petitioner the right to file his petition was based and grounded on the court's own false statements. Further, that the Order is a non-appealable order, and as such, deprives the petitioner of the right to seek an appeal wherein a fair and meaningful adjudication may be had in the matter. Moreover, it is the contention of the petitioner that the Court was and is aware of the above stated, and that it is done to frustrate the legal efforts of prisoners incarcerated in the California Mens Colony and that it is a wilful and intentional act to aid

and abet the illegal acts of the officials of this institution in their wanton, malicious, and sytematic policy under local custom to deprive this petitioner, as well as other prisoners seeking a meaningful access to the courts, of their federal Civil and Constitutional Rights.

VII

Petitioner is informed and believes, and therefore alleges, that the present motion to vacate is the proper avenue to employ under the circumstances of this case; that he as a state prisoner has complete freedom to seek remedies to set aside his conviction or obtain freedom from imprisonment; that it is an abuse of discretion for officials or prison authorities to utilize prison rules or local customs in such a way as to deny any inmate of the full opportunity to communicate with an attorney or to prepare and present and have meaningful access to any court in which he wishes to file any petition whatever that purports to seek some remedy of relief from illegal restraint, and that such an abuse of discretion deprives a state prisoner of rights secured under the Fourteenth Amendment of the Constitution of the United States of America.

VIII

WHEREFORE, petitioner respectfully prays that the Court reconsider its previous Memorandum and Order entered September 26, 1966, wherein the Court ordered the Clerk not to file the petition for writ of habeas corpus or mandamus as previously stated, and upon the court's reconsideration of that order that the court vacate its order and issue a new order compelling the Clerk to file the petition number 5101 and thereby allow the court to consider the allegations and issues presented in that petition on its merits.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
Petitioner and Movant in pro per

[*Duly sworn to by Robert Newton Gardner, Jr. jurat omitted in printing (all in italics)*]

BRIEF OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO VACATE ORDER DENYING FILING OF PETITION

One of California's leading authority on State Law, Bernard Witkin, states:

> ". . . and he (convict) has complete freedom to seek remedies to set aside his conviction or obtain freedom from imprisonment. (In Re Robinson (1952), 112 C.A. 2d 246)" *B. E. Witkin, California Procedure*, vol. 2, page 1025.

Bernard Witkin further states:

That a motion to vacate under California Code of Civil Procedure, section 663, is the proper attack upon a non-appealable order effecting the substantive rights of a party, and as such, upon denial of the motion to vacate, changes the non-appealable order to an appealable order. *B. E. Witkin, California Procedure*, Vol. 3, pages 2550 to 2560, (1954) Extraordinary writs.

> ". . . If officials and authorities of any State Prison in enforcing prison rules had in any suppressed an inmates rights under the Fourteenth Amendment to the United States Constitution, inmate is entitled to his discharge upon his petition for writ of habeas corpus."
>
> *Cochran* v. *Kansas*, 316 U.S. 255, 86 L. Ed. 1453
>
> *Billeaux* v. *Holmes*, 177 Fed. Supp. 361
>
> "It is an abuse of discretion for officials or prison authorities to utilize prison rules, regulation, or local custom, to deny any inmate of the full opportunity to communicate with friends, or an attorney, or to file any kind of petition in any court whatever that purports to seek some remedy or relief from illegal restraint."
>
> *In Re: Ferguson*, 55 A.C. 667
>
> *Proviano* v. *United States*, 353 U.S. 53-62
>
> "Access to the Courts is effectively denied by the preventing of the preparation of legal documents, as it is by the preventing of their filing."

Ex Parte Hull, 312 U.S. 546, 549

In Re Robinson, 112 Cal. App. 2d at p. 629

". . . If the Judge, having abandoned his judicial role, committed acts, or authoritatively directed the commission of acts, which ordinarily are related to prison official or police activity as opposed to judicial activity, the cloak of immunity should not protect him. The title of the office, quasi-judicial or even judicial, does not, of itself, immunize the officer from responsibility for unlawful acts that cannot be said to constitute an integral part of the judicial process." From the Original Transcript of *Robichaud* v. *Ronan*, 10-8-65 C.A. 9th. Opinion by Judge Ely. 352 F.2d ——, B.N.A. 34 Law Week 2210.

"When a plaintiff asserts that the defendants are depriving him of rights protected by the Constitution or Amendments, it is immaterial whether defendants conduct is legal or illegal as a matter of state law."

Monroe v. *Pape*, 365 U.S. 167

Fourteenth Amendment Rights have recently been fully incorporated in violation of Federal Civil and Constitutional Rights as proscribed in 42 U.S.C. 1983 and 1985 and the criminal conterpart, Title 18 U.S.C. 241 and 242.

U.S. v. *Price*, No. 65, B.N.A. 34 Law Week 4313

U. S. v. *Guest*, No. 59 & 60, B.N.A. 34 Law Week 4323

For the reasons heretofore stated and in accordance with the points and authorities hereinabove cited, it is requested that the Court vacate the order of September 26, 1966, and grant the prayer as previously prayed for in this motion.

DATED: 29 September 1966 at Los Padres, California

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
Petitioner-movant in pro per

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

No. 5101

[File endorsement omitted in printing]

In the Matter of the Application of
ROBERT NEWTON GARDNER, JR.,
For Writ of Habeas Corpus

ORDER—October 7, 1966

The petitioner's request that the Court Vacate the Order Denying Filing of the Petition is GRANTED.

This matter is ordered set for hearing on Monday, October 17, 1966, at 2:00 o'clock p.m.

DATED: October 7, 1966.

/s/ Richard F. Harris
Judge of the Superior Court

Copy mailed to Petitioner.

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

No. 5101

[File endorsement omitted in printing]

In the Matter of the Application of
ROBERT NEWTON GARDNER, JR.,
For Writ of Habeas Corpus

ORDER FOR PRODUCTION OF PATIENT—October 21, 1966

TO: H. V. FIELD, Superintendent, California Men's Colony, Los Padres, California.

An Order being made this day by me that ROBERT NEWTON GARDNER, Jr., be produced in this Court for further proceedings in the Matter of the Application of ROBERT NEWTON GARDNER, Jr. For Writ of Habeas Corpus.

YOU ARE COMMANDED to deliver him into the custody of the bailiff of the Court at 9:30 a.m. on the 20th day of December, 1966, Department II, Court House Annex, San Luis Obispo, California.

DATED: this 21 day of October, 1966.

/s/ Timothy I. O'Reilly
Judge of the Said Court

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

Habeas Corpus Case No. 5101

[File endorsement omitted in printing]

ROBERT NEWTON GARDNER, JR., PETITIONER

- *vs* -

HAROLD V. FIELD, Superintendent, California Mens Colony—East, Los Padres, California, RESPONDENT

MOTION FOR THE APPOINTMENT OF COUNSEL—
Filed December 6, 1966

TO THE HONORABLE TIMOTHY I. O'REILLY, JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN LUIS OBISPO:

Comes now the Movant, ROBERT NEWTON GARDNER, JR., in propria persona, and moves the Honorable Court to appoint counsel to represent him in the above entitled and numbered habeas corpus proceeding presently pending in this Court under the authority of the provisions of the California Penal Code, Section 1241. An affidavit in support of this motion is attached hereto.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Movant in propria persona

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

Case No. 5101

[File endorsement omitted in printing]

ROBERT NEWTON GARDNER, JR., PETITIONER

-*vs*-

HAROLD V. FIELD, Superintendent, California Mens Colony—East, Los Padres, California, RESPONDENT

AFFIDAVIT

AFFIDAVIT IN SUPPORT OF MOTION FOR THE APPOINTMENT OF COUNSEL—Filed December 6, 1966

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN LUIS OBISPO)

ROBERT NEWTON GARDNER, JR., under penalty of perjury, deposes and says:

That he is the petitioner in the above entitled petition for writ of habeas corpus.

That he is a citizen of the United States and a resident of the State of California, and of lawful age.

That he has a just and lawful cause for said action and verily believes that he is entitled to the hearing and the relief prayed for in his petition for writ of habeas corpus.

That said action is brought in good faith, but that he is a poor person and does not possess sufficient means to pay the services of legal counsel in representing him in said action. That he is a layman unskilled in law and does not possess the legal knowledge and skill necessary to litigate the action without legal counsel.

That officials of the institution incarcerating petitioner have confiscated his law books, rules of court, formats, and all the important items of a legal nature, to foreclose petitioner in his attempts to seek legal redress in propria persona. That numerous law books have been removed and ordered destroyed from the prison library.

WHEREFORE, your petitioner respectfully prays that the Honorable Court will appoint counsel to represent him in the matter presently before this Court and thereby afford petitioner a meaningful presentation and hearing of his cause.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Petitioner in propria persona

[*Duly sworn to by Robert Newton Gardner, Jr. jurat omitted in printing (all in italics)*]

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

Tuesday, December 6, 1966

Present: Hon. Timothy I. O'Reilly Judge Presiding, Department II

No. 5101

ROBERT NEWTON GARDNER, JR., PLAINTIFF

vs.

HAROLD V. FIELD, etc., DEFENDANT

ORDER—December 6, 1966

It is hereby ordered that the Public Defender is appointed as counsel for Robert Newton Gardner, the Petitioner herein.

MW

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

No. 5101

[File endorsement omitted in printing]

In the Matter of the Application of
ROBERT NEWTON GARDNER, JR.,
For a Writ of Habeas Corpus

MEMORANDUM OF DECISION—February 15, 1967

The above entitled matters were ordered consolidated for hearing.

Hearing came on the first day of February, 1967, in Department I of the Superior Court of San Luis Obispo, Judge Timothy I. O'Reilly presiding.

Prior to the taking of evidence the Court ruled that the Petition in No. 5101, although labeled a Petition for Writ of Mandamus or Injunction, was and is in fact a Petition for a Writ of Habeas Corpus.

The Court took evidence, both oral and documentary. At the conclusion of the taking of evidence, the matter was submitted with authorities from the petitioner and the respondents.

The Court having reviewed the evidence and having read the authorities now rules as follows:

That the Petitions be denied and the Writs dissolved. The Court specifically finds that:

1. There was no invasion of the constitutional rights of the petitioner;

2. That there occurred no impediment to his access to the courts;

3. That he had reasonable access to the courts and reasonable access to law books and other legal materials sufficient to meet the requirements of the law.

Dated this 15th day of February, 1967.

/s/ Timothy I. O'Reilly
TIMOTHY I. O'REILLY
Judge of the Superior Court
Department I

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

No. 5101

[File endorsement omitted in printing]

Received, Feb. 27, 1967, Ruth Warnken, County Clerk,
By [Illegible], Deputy

In the Matter of the Application of
ROBERT NEWTON GARDNER, JR.
For a Writ of Habeas Corpus

NOTICE OF MOTION UNDER INFORMA PAUPERIS PROVISION FOR FREE TRANSCRIPT OF ALL PROCEEDINGS HAD HEREOF
—Filed March 1, 1967

TO: THE DISTRICT ATTORNEY OF THE COUNTY OF SAN LUIS OBISPO, COUNTY COURTHOUSE ANNEX, SAN LUIS OBISPO, CALIFORNIA.

Please take notice that the undersigned will bring this attached Motion Under Informa Pauperis Provision For Free Transcript Of All Proceedings Had Hereof before the Honorable Timothy I. O'Reilly, Judge of the Superior Court, Department I, County of San Luis Obispo, Courthouse Annex, San Luis Obispo, State of California, on March 6, 1967, at 10:00 a.m. of that day or as soon thereafter as counsel may be heard.

DATED: February 23, 1967, at Los Padres, California.

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Petitioner in propria persona

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

No. 5101

In the Matter of the Application of
ROBERT NEWTON GARDNER, JR.
For a Writ of Habeas Corpus

MOTION UNDER INFORMA PAUPERIS PROVISION FOR FREE TRANSCRIPT OF ALL PROCEEDINGS HAD HEREOF

TO: THE HONORABLE TIMOTHY I. O'REILLY, JUDGE OF THE SUPERIOR COURT, DEPARTMENT I, COUNTY OF SAN LUIS OBISPO, COURTHOUSE ANNEX, SAN LUIS OBISPO, CALIFORNIA.

Comes now, ROBERT NEWTON GARDNER, JR., the petitioner in the above entitled cause, and moves the Honorable Court for an Order allowing him to obtain from the Clerk of the Court without the prepayment of any fees required therefor, the following portions of the record, proceedings, exhibits and evidence to be contained in the record for review in the Supreme Court of the State of California by avenue of Certiorari or Habeas Corpus:

1. All pleadings, motions, memoranda and affidavits in support thereof as presented by petitioner and respondent.
2. All exhibits presented by respondent.
3. Clerk's Minutes with docket entries of all actions prior to and during hearing of February 1, 1967.
4. The Order and Judgment of the Court.
5. The complete record of all the proceedings, both oral testimony and documentary evidence with any accompanying exhibits from the date of filing of original petition, September 17, 1966, to an including the Order of this Court regarding the instant Motion Under Informa Pauperis Provision for Free Transcript of All Proceedings Had Hereof.

The ground and reason upon which this Motion is based is that movant-petitioner has no funds, nor property, real or otherwise, with which to pay the costs of the preparation of said transcript and that such record is necessary as exhibits and as reference to the full hearing had in the matter, and essential to petitioner as reference in the aid of the preparation for a Writ of *Certiorari* or *Habeas Corpus* which he is desirous of filing with the Clerk of the Supreme Court of the State of California.

The Motion is based upon the Brief of Points and Authorities and Informa Pauperis Affidavit of petitioner, which is annexed hereto.

DATED: February 23, 1967 at Los Padres, California.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Movant in propria persona

ROBERT NEWTON GARDNER, JR.
A-28381
California Mens Colony-East
Los Padres, California 93401
Petitioner in propria persona

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

No. 5101

In the Matter of the Application of
ROBERT NEWTON GARDNER, JR.
For a Writ of Habeas Corpus

BRIEF OF POINTS AND AUTHORITIES

REASONS FOR GRANTING MOTION

On September 17, 1966, petitioner presented to this Court his Petition for Writ of Mandamus or Injunction, No. 5101. On October 30, 1966, petitioner presented his Petition for Writ of Habeas Corpus, No. 5170.

Upon motion by petitioner the above entitled matters were ordered consolidated for hearing. After several prehearing actions and continuances the hearing came on the first day of February, 1967, in Department I of the Superior Court of San Luis Obispo, Judge Timothy I. O'Reilly presiding.

Prior to the taking of evidence the Court ruled that the Petition in No. 5101, although labeled a Petition for Writ of Mandamus or Injunction, was and is in fact a Petition for a Writ of Habeas Corpus.

During the hearing the Court took evidence, both oral and documentary. At the conclusion of the taking of evidence, the matter was submitted with authorities from the petitioner and the respondents.

The Court after reviewing the evidence and having read the authorities ruled adversely to petitioner on February 15, 1967. It is assumed by petitioner, due to state-

ments made by the Court during hearing, that basis for the court's ruling was the State Supreme Court Case *In re Chessman*, 44 Cal. 2d 23.

Petitioner does not complain of the full hearing accorded him by this Honorable Court. The hearing was a full and fair hearing and it is the contention of the petitioner that the evidence adduced at that hearing will substantiate the claims of petitioner.

Petitioner contends that while this court's ruling may comply with *In re Chessman*, it is not in accord with the recent decisions and trend of the Supreme Court of the United States in that Court's expanded scope as to the rights secured by the Fourteenth Amendment.

The transcript of the above mentioned hearing is necessary to petitioner so that he may properly present his claims to the California Supreme Court and to allow that Court to review the evidence adduced and the entire record so that Court may properly adjudicate the issues and review this court's decisions regarding the federal questions presented by the petitioner.

In addition to requesting a review of the entire record of all proceedings had in the above entitled case, petitioner will allege as follows:

1. That the present interpretations of the *In re Chessman* case now causes an abridgment of petitioner's federally protected constitutional rights and as such should be overruled.

2. That there was and is now an invasion of the federal constitutional rights of the petitioner.

3. That there was and is now a flagrant discrimination causing a denial of equal privileges to state prisoners who seek to lawfully petition the courts.

4. That State prisoners have been and are now being punished for exercising or attempting to exercise their right to lawfully seek review of their case or to petition the courts.

5. That the acts of respondents as spelled out in the hearing show an infringement upon petitioner's right of access to the courts.

6. That the record will show that petitioner does not have meaningful access to the courts and reasonable ac-

cess to law books, rules, and other legal material sufficient to meet the requirements of the Fourteenth Amendment of the Constitution of the United States.

BRIEF OF POINTS AND AUTHORITIES

Proposition of Law

The Equal Protection Clause of the Fourteenth Amendment Requires That Indigent Defendants and State Prisoners Be Afforded the Same Opportunity to Review Their Conviction or Collateral Proceedings As Persons Who Have Money to Buy the Record or Transcript of the Trial or Proceeding at Issue.

Argument

It cannot be said that the State of California has any right to reserve, or withhold from an indigent defendant in a criminal case or state prisoner in collateral or post-conviction proceeding, transcripts which would tend to exculpate the alleged criminality of such defendant or tend to prove post-conviction constitutional deprivations of state prisoner.

This doctrine is clearly defined by the United States Supreme Court. A summary of that doctrine will be presented hereinafter:

In *Griffin* v. *Illinois*, 351 U.S. 12, the Court held that a State with an appellate system which made available trial transcripts to those who could afford them was constitutionally required to provide "means of affording adequate and effective appellate review to indigent defendants." Id., at 20. The Court held that "destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Id., at 19.

In *Burns* v. *Ohio*, 360 U.S. 252, involving a $20 fee for filing a motion for leave to appeal a felony conviction to the Supreme Court of Ohio, the United States Supreme Court held that "once the State chooses to establish appellate review in criminal cases, it may not foreclose in-

digents from access to any phase of that procedure because of their poverty . . ." "This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency." Id., at 257.

In *Smith* v. *Bennett*, 365 U.S. 708, the Supreme Court made clear that these principles were not to be limited to direct appeals from criminal convictions, but extended alike to State post-conviction proceedings. "Respecting the State's grant of a right to test their detention," the Court said, "the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each." Id., 714.

In *Eskridge* v. *Washington Prison Board*, 357 U.S. 214, the Supreme Court held invalid a provision of Washington's criminal appellate system which conferred upon the trial judge the power to withhold a trial transcript from an indigent upon the finding that "justice would not be promoted . . . in that defendant has been accorded a fair and impartial trial, and in the court's opinion no grave or prejudicial errors occurred therein." Id., at 215. There it was said that "the conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript." Id., at 216. *In Eskridge* the Supreme Court held constitutionally invalid the above provision which permitted a trial judge to prevent an indigent from taking an effective appeal.

In *Lawrence Long* v. *District Court of Iowa*, No. 77, October Term, 1966, decided Dec. 5, 1966, 35 LW 4046 (BNA United States Law Week), the latest and controlling case of the U.S. Supreme Court involving transcripts of habeas corpus proceedings. The Court held in *Long* that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty or the protection of his constitutional rights is to deny that prisoner the equal protection of the laws. The Court further held that . . . "We

specifically held in *Smith* that having established a post-conviction procedure, a State cannot condition its availability to an indigent upon any financial consideration." In *Long*, the petitioner sought habeas corpus in the District Court of Iowa, and after an evidentiary hearing that court found against the petitioner on the facts of his claims. Petitioner thereupon applied to the District Court for free transcripts of the proceedings to allow him to petition the Supreme Court of Iowa for a review of that proceeding and the finding by the District Court. The District Court denied the motion for free transcripts and upon Certiorari the United States Supreme Court reversed and remanded.

In the instant matter presently before the bar, petitioner's cause falls clearly within the area staked out by the Supreme Court's decisions in *Griffin*, *Burns*, *Smith*, *Eskridge*, and *Long*. To be sure, petitioner's case does not involve, as did *Griffin*, a direct appeal from a criminal conviction, but *Smith* makes it clear that the *Griffin* principle also applies to state post-conviction proceedings, and *Burns* leaves no doubt that the same principle applies even though the State has already provided one review on the merits. And *Long* v. *Iowa* clearly shows petitioner's right to the transcripts of the hearing had in the present habeas corpus case and the *Long* case should be controlling here.

Section 1473 of the California Penal Code confers upon the petitioner the *right* to prosecute a petition for writ of habeas corpus. To adequately present a *prima facie* case to the satisfaction of the California Supreme Court to which petitioner will present his petition seeking review of the hearing had in this court, it is necessary that petitioner be afforded the court records in question, the transcripts as spelled out on page 2, line 28 to and including page 3, line 7 of Motion herein, for those transcripts will be necessary to petitioner in the proper preparation of his petition seeking review of the hearing had in the instant case. In addition, the transcripts will be necessary to prove the petitioner's allegations of constitutional deprivations spelled out during that hearing and

to substantiate the allegations and cause of petitioner by the evidence adduced at that hearing.

To deny petitioner these transcripts, is in effect, to deny him the *right* to prosecute a petition for writ of habeas corpus or certiorari and to seek review from any adverse habeas corpus hearing and judgment or order. To hold otherwise would allow only such petitioners who are able to pay for transcripts the right to prosecute a writ of habeas corpus and seek review from any adverse opinion after hearing, and to deny the same right to indigent petitioners regardless as to merit. "Where a right is conferred by law everything necessary for its protection is also conferred." *People* v. *McGorvey*, 61 C.A. 2d 557 at 563.

The petitioner having the right to the writ of certiorari and habeas corpus, then has the right to establish a *prima facie* cause for the issuance of such writ. In the case at bar, the petitioner will be unable to do so unless he is furnished with the transcript of all proceedings had in the matter as requested on pages 2 and 3 of the Motion herein.

CONCLUSION

Premises considered it is respectfully urged that the Motion Under Informa Pauperis Provision For Free Transcript Of All Proceedings Had Hereof be granted and that the respective court officers be ordered to prepare the record thereof which is needed by the petitioner as heretofore set forth.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Movant-petitioner in pro per

[*Duly sworn to by Robert Newton Gardner, Jr. jurat omitted in printing (all in italics)*]

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

No. 5101

In the Matter of the Application of
ROBERT NEWTON GARDNER, JR.
For a Writ of Habeas Corpus

AFFIDAVIT

IN FORMA PAUPERIS AFFIDAVIT
IN SUPPORT OF MOTION

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN LUIS OBISPO)

I, ROBERT NEWTON GARDNER, JR., being aware of the penalty of perjury and according to law, depose and say that I am the petitioner in the above entitled cause and, in support of my Motion Under Informa Pauperis Provision For Free Transcript Of All Proceedings Had Hereof, state:

1. I am a citizen of the United States and California.
2. Because of my poverty I am unable to pay the cost of the transcripts of proceedings necessary to my cause.
3. I am unable to give security for same and I presently have less than $10.00 in cash available to me.
4. I believe I am entitled to the redress and relief that I seek in said cause.
5. I am a prisoner confined in the California State Prison system and have been so confined for over the past seven years.
6. The nature of said cause is briefly stated as follows:

That after full evidentiary hearing the court ruled against petitioner, not on the facts of his claims, but as to the interpretation of rights secured by the

Fourteenth Amendment. Petitioner seeks review of that hearing and the federal questions therein presented. Petitioner requires the transcript of that hearing to properly prepare and present his claims to the State Supreme Court and then, if necessary, to the United States Supreme Court on Certiorari as the interpretation and decisions made by this court as to the federal issues during the hearing and the order denying petition is in itself a federal question.

WHEREFORE, petitioner respectfully requests that his Motion Under Informa Pauperis Provision For Free Transcript Of All Proceedings Had Hereof be granted allowing petitioner to be afforded the necessary record without the prepayment of any costs.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Affiant and Petitioner

[*Duly sworn to by Robert Newton Gardner, Jr. jurat omitted in printing (all in italics)*]

[Affidavit of Service by Mail (omitted in printing)]

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

No. 5101

[File endorsement omitted in printing]

In the Matter of the Application of
ROBERT NEWTON GARDNER, JR.,
For Writ of Habeas Corpus

ORDER DENYING MOTION—March 1, 1967

Petitioner seeks a copy of the transcript of proceedings had before Honorable Timothy I. O'Reilly. These are sought as "evidence to be contained in the record for review in the Supreme Court of the State of California by avenue of Certiorari or Habeas Corpus."

The petitioner may present all matters which were involved in his hearing before Judge O'Reilly by filing a new petition for Writ of Habeas Corpus before a Court having jurisdiction of his matter (including but not limited to the California Supreme Court). His request for relief by such a Court will not be affected by the action of Judge O'Reilly and aside from a statement in his petition that he has sought relief in this Court, with the date thereof stated, none of the proceedings here will be of concern to the Court before whom the new petition is presented. If that Court for some reason of its own wants a copy of the record, it can order one prepared.

There is no appeal from a denial of a petition for Writ of Habeas Corpus.

The petition is DENIED.

Dated: March 1, 1967.

/s/ Richard J. Harris
Judge of the Superior Court
Dept. II

Certified copy sent to Petitioner. 1 copy to Dist. Atty. 1 copy to H. V. Field, Superintendant CMC 3-1-67 MC

ORIGINAL

Mar. 28, 1967, Denied, Ford, Coby, Moss

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ——

2 Civ 31580

[File endorsement omitted in printing]

ROBERT NEWTON GARDNER, JR., PETITIONER

- *vs* -

SUPERIOR COURT OF THE STATE OF CALIFORNIA, In and for the County of San Luis Obispo, RESPONDENT

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN LUIS OBISPO, CASE No. 5101—Filed March 14, 1967

* * * *

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ——

Case No. 2/Crim. ——

ROBERT NEWTON GARDNER, JR., PETITIONER

HAROLD V. FIELD, Superintendent, California Mens Colony —East, Los Padres, California, etc., et al, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, LOS ANGELES, CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN LUIS OBISPO, CASE NO. 5101

The petition of ROBERT NEWTON GARDNER, JR. respectfully shows:

I

That this Court has jurisdiction to issue its writ of certiorari under the California Code of Civil Procedure, section 1068. Further jurisdiction is conferred upon this Court under the Due Process and Equal Protection Clauses of both the California and Federal Constitutions.

II

That your petitioner, ROBERT NEWTON GARDNER, JR., is a state prisoner presently incarcerated in the California Mens Colony—East, Los Padres, California, within the jurisdiction of this Court, and as such a prisoner has a federal civil and constitutional right to prepare and prosecute petitions for writ of habeas corpus. That right includes a transcript of any evidentiary hear-

ing had in a habeas corpus proceeding, which would prove petitioner's claims and aid him in presenting his cause for review by habeas corpus or by certiorari in the higher courts.

III

On February 23, 1967, the petitioner presented his MOTION UNDER INFORMA PAUPERIS PROVISIONS FOR FREE TRANSCRIPTS OF ALL PROCEEDINGS HAD HEREOF to the Superior Court, in and for the County of San Luis Obispo, Case No. 5101. On March 1, 1967, that court issued its Order denying the aforesaid Motion and on March 7, 1967, the petitioner was notified of said denial. The Superior Court dénied the above Motion for Free Transcripts of the evidentiary hearing had on the ground that "There is no appeal from a denial of a petition for wrti of habeas corpus." And ". . none of the proceedings here will be of concern to the Court before whom the new petition is presented." Petitioner seeks certiorari to this Order Denying Motion from the Superior Court of San Luis Obispo County.

IV

On September 17, 1966, petitioner presented to the San Luis Obispo Superior Court his Petition for Writ of Mandamus or Injunction, No. 5101. On October 30, 1966, petitioner presented his Petition for Writ of Habeas Corpus, No. 5170.

Upon motion by petitioner the above entitled matters were ordered consolidated for hearing. After several prehearing actions and continuances the hearing came on the first day of February, 1967, in Department I of the Superior Court of San Luis Obispo, Judge Timothy I. O'Reilly, presiding.

Prior to the taking of evidence the court ruled that the Petition in No. 5101, although labeled a Petition for Writ of Mandamus or Injunction, was and is in fact a Petition for Writ of Habeas Corpus.

During the hearing the court took evidence, both oral and documentary. At the conclusion of the taking of evidence, the matter was submitted with authorities from the petitioner and the respondents.

The court after reviewing the evidence and having read the authorities ruled adversely to petitioner on February 15, 1967. It is assumed by petitioner, due to statements made by the court during hearing, that the basis for the court's ruling was the State Supreme Court case *In re Chessman*, 44 Cal. 2d 23.

Petitioner does not complain of the full hearing accorded him by the Superior Court. The hearing was a fair hearing and it is the contention of the petitioner that the evidence adduced at that evidentiary hearing will prove his cause and substantiate his claims.

Petitioner contends that while the Superior Court's ruling may comply with *In re Chessman*, supra, it is not in accord with the recent decisions and trend of the Supreme Court of the United States in that Court's expanded scope of the rights secured by the Fourteenth Amendment.

The transcript of the above mentioned evidentiary hearing is necessary as an exhibit and as reference to the full hearing had in the matter and essential to petitioner as reference in the aid of the preparation for a Petition for Writ of Certiorari and Habeas Corpus which he is desirous of filing in the Supreme Courts of the United States and the State of California. Moreover, the transcripts of that hearing is necessary to petitioner so that he may properly present his claims to those Courts and to allow those Courts to review the entire record and the evidence adduced therein so they may properly adjudicate the issues and review the Superior Court's decisions regarding the federal questions presented by the petitioner.

Petitioner contends that the transcript of the hearing had in the above matter will clearly prove the following:

1. That the present interpretations of the *In re Chessman* case now causes an abridgement of petitioner's federally protected constitutional rights and should be overruled.

2. That there was and is now an invasion of the federal constitutional rights of the petitioner.

3. That there was and is now a flagrant discrimination causing a denial of equal privileges to state prisoners who seek to lawfully petition the courts.

4. That state prisoners have been and are now being punished for exercising or attempting to exercise their right to lawfully seek review of their case or to petition the courts seeking redress.

5. That the acts of the respondents as spelled out in the hearing show an infringement upon the petitioner's right of access to the courts.

6. That the record will show that petitioner does not have meaningful access to the courts and reasonable access to law books, rules, and other necessary legal material sufficient to meet the requirements of the Fourteenth Amendment.

V

The transcripts of the evidentiary hearing had in this matter are necessary to the petitioner. Other petitioners with money under like circumstances would be free to purchase the transcripts in question. The petitioner is being denied the necessary and important transcripts solely due to his indigency.

VI

The Order of the Superior Court denying petitioner's Motion for Free Transcripts of the Evidentiary Hearing had is not in accord with the United States Supreme Court's mandate spelled out in *Long* vs. *Iowa*, No. 77, October Term, 1966, decided Dec. 5, 1966, 35 LW 4046 (BNA United States Law Week) and *Smith* vs. *Bennett*, 365 U.S. 708. And see other authorities cited in MOTION UNDER IN FORMA PAUPERIS PROVISION FOR FREE TRANSCRIPTS OF ALL PROCEEDINGS HAD HEREOF, pages 6, 7, 8, 9, and 10 of that Motion.)

VII

There is no appeal from the Order of the Superior Court denying motion for free transcripts. No appeal is available here from any subsequent order. That petitioner does not have a plain, speedy, and adequate remedy in the ordinary course of law and the petition for writ of certiorari sought here is the proper relief and remedy under the special circumstances of this case.

VIII

Though the Superior Court had fundamental jurisdiction, it acted in excess of its jurisdiction by the issuance of the non-appealable order involving the federal constitutional rights of petitioner. The order of the Superior Court was in excess of its jurisdiction and certiorari is sought to annul that unconstitutional proceeding and order denying petitioner his federally protected Fourteenth Amendment rights.

IX

WHEREFORE, petitioner prays that the Honorable Court issue its Writ of Certiorari to the Superior Court, in and for the County of San Luis Obispo, Case No. 5101, and thereby order the record of that court brought up for examination. That after an examination of that record this Court issue its order to annul the unconstitutional action of the court below.

Petitioner further prays for such other and further relief as to this Court may seem just in the safeguarding of the petitioner's constitutional rights.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Petitioner in propria persona

[*Duly sworn to by Robert Newton Gardner, Jr. jurat omitted in printing (all in italics)*]

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ——

Case No. 2/Crim. ——

ROBERT NEWTON GARDNER, JR., PETITIONER

- vs -

HAROLD V. FIELD, Superintendent, etc., et al,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner ROBERT NEWTON GARDNER, JR. asks leave to file the attached Petition For Writ Of Certiorari without the prepayment of costs and to proceed in forma pauperis. The petitioner's affidavit in support of this petition is attached hereto.

DATED: March 11, 1967, at Los Padres, California.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Petitioner in propria persona

AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN LUIS OBISPO)

I, ROBERT NEWTON GARDNER, JR., being aware of the penalty of perjury and according to law, depose and say that I am the petitioner in the above entitled cause and, in support of my application for leave to proceed without being required to prepay costs and fees, state:

1. I am a citizen of the United States and the State of California.

2. Because of my poverty I am unable to pay the cost of said cause.

3. I am unable to give security for same.

4. I believe that I am entitled to the redress and relief that I seek in said cause.

5. I am a prisoner confined in the California Mens Colony—East, Las Padres, California, and have been a prisoner in California for over the past seven years.

6. The nature of said cause is briefly stated as follows: I have been denied needed transcripts of an evidentiary hearing had in a habeas corpus proceeding solely due to my indigency. The denial of those transcripts foreclose me a full and adequate presentation of my cause to the Federal Courts and thereby deprives me of my federally protected Fourteenth Amendment Rights. This is a Petition for Writ of Certiorari to the court below and wherein petitioner seeks an Order to annul the acts of the lower court.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Petitioner in propria persona

[*Duly sworn to by Robert Newton Gardner, Jr. jurat omitted in printing (all in italics)*]

[Affidavit of Service by Mail (omitted in printing)]

62

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLANT DISTRICT DIVISION THREE

MINUTES OF MARCH 23, 1967

Civil No. 31580

GARDNER

vs.

SUPERIOR COURT OF SAN LUIS OBISPO

THE COURT:

Petition for writ of certiorari denied.

* * * *

Permission to File Granted

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

2 Civ 31580

[File endorsement omitted in printing]

ROBERT NEWTON GARDNER, JR., PETITIONER

-vs-

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
In and for the County of San Luis Obispo, RESPONDENT

PETITION FILED LATE

PETITION FOR HEARING RE: DENIAL OF CERTIORARI, DCA 2ND NO. 2/CIV. 31580 DIRECTED TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF SAN LUIS OBISPO, CASES 5101 AND 5170

ROBERT NEWTON GARDNER, JR.
A-28381
California Mens Colony
East Facility
Los Padres, California 93401
Petitioner in Propria Persona

DECIDED 3-23-67

HEARING DUE 4-22-67—Ext. to 5/22/67

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Case No. ———

ROBERT NEWTON GARDNER, JR., PETITIONER

- *vs* -

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
In and for the County of San Luis Obispo, RESPONDENT

PETITION FOR HEARING

PETITION FOR HEARING RE: DENIAL OF CERTIORARI, DCA 2ND CASE NO. 31580, DIRECTED TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF SAN LUIS OBISPO, CASES 5101 AND 5170

TO THE HONORABLE CHIEF JUSTICE ROGER J. TRAYNOR AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

The petition of ROBERT NEWTON GARDNER, JR., respectfully shows:

I

That this Court has jurisdiction to grant a hearing in the above entitled matter under Rules 28 and 29 of the California Appellate Rules and the California Code of Civil Procedure, Section 1068, et seq. Further jurisdiction is conferred upon this Court under the Due Process and Equal Protection Clauses of both the California and the United States Constitutions.

II

That your petitioner, ROBERT NEWTON GARDNER, JR., is a state prisoner, proceeding in propria persona and informa pauperis, presently incarcerated in the Cali-

fornia Mens Colony, East Facility, Los Padres, California, within the jurisdiction of this Court, and as such a prisoner has a federal civil and constitutional right to prepare and prosecute petitions for writ of habeas corpus. That right includes a transcript of any evidentiary hearing had in a habeas corpus proceeding, which would prove petitioner's claims and aid him in presenting his cause for review by habeas corpus or certiorari in the higher courts.

III

On February 23, 1967, the petitioner presented his MOTION UNDER INFORMA PAUPERIS PROVISIONS FOR FREE TRANSCRIPTS OF ALL PROCEEDINGS HAD HEREOF to the Superior Court, in and for the County of San Luis Obispo, Case No. 5101. On March 1, 1967, that court issued its order denying the aforesaid Motion and on March 7, 1967, that court notified petitioner of said denial.

The Superior Court denied the above Motion for Free Transcripts of the evidentiary hearing had on the ground that "There is no appeal from a denial of a petition for writ of habeas corpus." And ". . . none of the proceedings here will be of concern to the Court before whom the new petition is presented." Petitioner sought certiorari in the District Court of Appeal, Second Appellate District, Case No. 2/Crim. 13314, to this Order Denying Motion from the Superior Court of San Luis Obispo County, Case No. 5101 and 5170. On March 23, 1967, the District Court of Appeal issued its Post Card Denial No. 31580, denying petition for writ of certiorari without opinion, findings of fact, or conclusions of law. Petition for Rehearing was not sought in accordance with Rules 27 (a) and 56 of the California Appellate Rules.

Petitioner seeks a petition for hearing in this Court to the orders denying free transcripts and denying certiorari.

IV

On September 17, 1966, petitioner presented to the San Luis Obispo Superior Court his Petition for Writ of Man-

damus or Injunction, No. 5101. On October 30, 1966, petitioner presented his Petition for Writ of Habeas Corpus, No. 5170.

Upon Motion by petitioner the above entitled matters were ordered consolidated for hearing. After several pre-hearing actions and continuances the hearing came on the first day of February, 1967, in Department I of the Superior Court of San Luis Obispo County, Judge Timothy I. O'Reilly presiding.

Prior to the taking of evidence the Court ruled that the Petition in No. 5101, although labeled a Petition for Writ of Mandamus or Injunction, was and is in fact a Petition for a Writ of Habeas Corpus.

During the hearing the court took evidence, both oral and documentary. At the conclusion of the taking of evidence, the matter was submitted with authorities from the petitioner and the respondents.

The court after reviewing the evidence and having read the authorities ruled adversely to petitioner on February 15, 1967. It is assumed by petitioner, due to statements made by the court during hearing, that the basis for the court's ruling was the State Supreme Court case *In re Chessman*, 44 Cal. 2d 23.

Petitioner does not complain of the full hearing accorded him by the Superior Court. The hearing was a fair hearing and it is the contention of the petitioner that the evidence adduced at that hearing will prove his cause and substantiate his claims.

Petitioner contends that while the Superior Court's ruling may comply with *In re Chessman*, supra, it is not in accord with the recent decisions and trend of the Supreme Court of the United States in that Court's expanded scope of rights secured by the Fourteenth Amendment to the Constitution.

The transcripts of the above mentioned evidentiary hearing as an exhibit and as reference to the evidence taken in the matter . . . is essential to petitioner as he desires to present the same matter to an appellate court and the federal courts. Those courts would be interested in the transcript and may not need any additional testimony. Moreover, petitioner needs the transcripts so that

he may be able to submit the matter on the of the evidentiary hearing had in the matter. Furthermore, the transcript of that hearing is necessary to the petitioner so so that he may properly present his claims to those courts and to allow those courts to review the entire record and the evidence adduced therein so they may properly adjudicate the the issues and review the Superior Court's decisions regarding the federal questions therein presented by the petitioner.

Petitioner alleges that the transcript of the hearing had in the above matter will clearly prove the following:

1. That the present expanded interpretations of the *In re Chessman* case now causes an abridgement of petitioner's federally protected rights as secured by the United States Constitution and as such should be overruled.
2. That there was and is now an invasion of the federal constitutional rights of the petitioner.
3. That there was and now is a flagrant discrimination causing a denial of equal protection and privileges to state prisoners who seek to lawfully petition the courts.
4. That state prisoners have been and are now being punished for exercising or attempting to exercise their right to lawfully seek review of their case or to petition the courts seeking redress from unconstitutional acts.
5. That the acts of the respondents as spelled out in the evidentiary hearing show an infringement upon the rights of petitioner and deny him adequate and meaningful access to the courts.
6. That the record will show that petitioner and others similarly situated do not have meaningful aecess to the courts and reasonable access to law books, rules, and other necessary legal materials sufficient to meet the requirements of the Fourteenth Amendment of the United States Constitution.

V

As heretofore shown the transcripts of the evidentiary hearing had in the matter are necessary to the petitioner. Other petitioners with money under like circumstances would be free to purchase the transcripts in question. The petitioner is being denied the necessary and available transcripts solely due to his indigency.

VI

The order of the Superior Court denying petitioner's Motion for Free Transcripts of the evidentiary hearing had is not in accord with the United States Supreme Court mandate spelled out in *Long* vs. *Iowa*, No. 77, October Term, 1966, decided December 5, 1966, 35 Law Week 4046 (B.N.A. United States Law Week) and *Smith* vs. *Bennett*, 365 U.S. 708. And see other authorities cited in MOTION UNDER INFORMA PAUPERIS PROVISIONS FOR FREE TRANSCRIPTS OF ALL PROCEEDINGS HAD HEREOF, pages 6 to 10 of that Motion. (See Exhibit 1 annexed hereto.)

VII

There is no appeal from the Order of the Superior Court denying the motion for free transcripts. No appeal is available here from any subsequent order. That petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law and the petition for writ of certiorari that was sought, in the District Court of Appeal was the only proper remedy or avenue open to petitioner. The Petition for Hearing here sought is the proper remedy and relief under the specific circumstances of this case.

VIII

Though the Superior Court had fundamental jurisdiction, it acted in excess of its jurisdiction by the issuance of the non-appealable Order involving the federal constitutional rights of the petitioner. The Order of the Superior Court denying the petitioner his needed transcripts was in excess of its jurisdiction and certiorari was sought prior to the present petition for hearing seeking to annul that unconstitutional proceeding and Order denying petitioner his Fourteenth Amendment rights.

IX

Petitioner submits to this Court a Group of Exhibits, numbered 1 through 10, which consists of all actions had in this matter excluding only the transcripts in questions.

This group of exhibits is the personal file of the petitioner and it is to be returned to the petitioner after this Court issues its Order calling up the records of the court below or after this Court denies the present petition for hearing as the group of exhibits will be needed to present to the United States Supreme Court on certiorari. This Petition is being presented within thirty days of the Order denying Certiorari.

X

WHEREFORE, petitioner prays that the Honorable Court grant the Petition for Hearing directed to the District Court of Appeal, Second Appellate District, Case No. 31580, and/or the Superior Court, County of San Luis Obispo, Case No. 5101, and thereby order the records of either or both courts brought up for review. That after a review of that record this Court issue its Order to annul the unconstitutional action of the court below.

Petitioner further prays for such other and further relief as to this Court may seem just in the safeguarding of the petitioner's constitutional rights.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Petitioner in propria persona

[*Duly sworn to by Robert Newton Gardner, Jr. jurat omitted in printing (all in italics)*]

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Case No. ———

ROBERT NEWTON GARDNER, JR., PETITIONER

-*vs*-

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
In and for the County of San Luis Obispo, RESPONDENT

PETITION FOR HEARING

PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner ROBERT NEWTON GARDNER, JR., asks leave to file the attached Petition For Hearing without the prepayment of costs and to proceed in forma pauperis. The petitioner's Affidavit in support of this petition is attached hereto.

DATED: April 17th, 1967, Los Padres, California.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Petitioner in propria persona

AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN LUIS OBISPO)

I, ROBERT NEWTON GARDNER, JR., being aware of the penalty of perjury and according to law, depose and say that I am the petitioner in the above entitled

cause and, in support of my application for leave to proceed without being required to prepay costs and fees, state:

1. I am a citizen of the State of California and the United States.
2. Because of my poverty I am unable to pay the cost of said cause.
3. I am unable to give security for same.
4. I believe that I am entitled to the redress and relief that I seek in said cause.
5. I am a prisoner confined in the California Mens Colony, East Facility, Los Padres, California, and have been a prisoner in California for over the past 7 years.
6. The nature of said cause is briefly stated as follows:

I have been denied needed transcripts of evidentiary hearing had in habeas corpus proceedings solely due to my indigency. The denial of said transcripts deny me a full and adequate preparation and presentation of my cause to the federal courts and thereby deprive me of my federally protected Fourteenth Amendment Rights. This is a Petition For Hearing in the matter of the denial of my Petition for writ of Certiorari directed to the Superior Court and wherein petitioner seeks and Order to annul the action of that lower court.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Petitioner in propria persona

[*Duly sworn to by Robert Newton Gardner, Jr. jurat omitted in printing (all in italics)*]

[Affidavit of Service by Mail (omitted in printing)]

ORDER DUE
May 22, 1967

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 3, Civil No. 31580

Filed, May 10, 1967, William I. Sullivan, Clerk,
By J. M. R., S. F. Deputy

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

GARDNER, JR.

v.

THE SUPERIOR COURT OF THE COUNTY OF SAN LUIS OBISPO

Petition for hearing DENIED.

/s/ Peters
Acting Chief Justice

MENC

SUPREME COURT OF THE UNITED STATES

No. 176 Misc., October Term, 1967

ROBERT NEWTON GARDNER, JR., PETITIONER

v.

CALIFORNIA

On petition for writ of Certiorari to the Superior Court of the State of California, County of San Luis Obispo.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1399 and placed on the summary calendar.

May 6, 1968

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 318673 1st

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 15 1968
JOHN F. DAVIS, CLERK

SUPPLEMENTAL APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. 73

ROBERT NEWTON GARDNER, JR.,
Petitioner,

—v.—

CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO

PETITION FOR CERTIORARI FILED JUNE 3, 1967
CERTIORARI GRANTED MAY 6, 1968

Supreme Court of the United States

OCTOBER TERM, 1968

No. 73

ROBERT NEWTON GARDNER, JR.,

Petitioner,

—v.—

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO

INDEX

	Page
Register of Criminal Actions, Superior Court, San Luis Obispo County, California, Action No. 5101	1
Order to show cause re petition for writ of habeas corpus and order for production of prisoner filed October 18, 1966	5
Petition for writ of habeas corpus dated October 30, 1966 and filed November 16, 1966	7
Order to show cause re petition for writ of habeas corpus and order for production of prisoner filed December 6, 1966	44

REGISTER OF CRIMINAL ACTIONS, SUPERIOR COURT, SAN LUIS OBISPO COUNTY, CALIFORNIA

No. of Action 5101

In the Matter of the Application of
ROBERT NEWTON GARDNER, JR.
for a Writ of Habeas Corpus

Nature of Offense: Petition for Writ of Habeas Corpus

James W. Powell
Public Defender (Appt. 12-6-66)

1966

Sept.	23	Petition for Writ of Mandate or Injunction filed. Delivered to office of Judge Harris.
Sept.	27	Memorandum filed. Copy mailed to the Petitioner.
Oct.	6	Document Entitled "Motion to Vacate Order Denying Filing of Petition". Received. Delivered to the Office of Judge Harris.
Oct.	7	Order. Filed. Copy mailed to Petitioner. (Harris)
Oct.	13	Order to Show Cause Re: Petition for Writ of Habeas Corpus and Order for Production of Prisoner. Filed (Harris)
Oct.	13	Return to Order to Show Cause. Filed.
Oct.	17	Petitioner Advised of rights. Judge Richard F. Harris disqualifies himself. Hearing ordered transferred to Dept. II (Harris)
Oct.	17	Hearing continued to Tuesday, Dec. 20, 1966—Dept II, 9:30 a.m. (OR)

1966

Oct. 21 Order for Production of Patient. Filed.

Nov. 16 Petition for Writ of Habeas Corpus. filed. Sent to Judge O'Reilly

Dec. 6 Order to Show Cause re Petition for Writ of Habeas Corpus & Order for Production of Patient. filed.

Dec. 6 Motion & Affidavit for Appointment of Counsel. filed.

Dec. 6 Public Defender appointed as counsel for Petitioner. (O'R)

Dec. 8 Return to Order to Show Cause. filed.

Dec. 14 Subpoena issued for Peo.

Dec. 14 Hearing on Petition for Writ of Habeas Corpus now set for Tues. Dec. 20, 1966 is ordered continued to Thurs., Dec. 22, 1966. (O'R)

Dec. 22 Petition for Writ of Mandamus or Injunction. filed.

Dec. 22 Hearing is continued on Motion of Wendt, to Wednesday, Feb. 1-67, 9:30 a.m., Dept. I. Ruling on Restraining Order withheld at this time. Court directs order in open Court to Mr. Fryer of Men's Colony to the effect that no alterations or changes of the records of defendant shall be made. The Court further orders the Sgt in charge of legal documents and materials shall provide these documents to defendant within the limitations of the distribution of these things. Remanded to Deputies from C.M.C. (O'R)

1967

Feb. 1 Trial commenced and concluded and ordered to stand submitted (O'R)

Feb. 15 In the Matter heretofore submitted, the Court now rules in accordance with Memorandum of Decision on file (O'R)

1967

Mar. 1 Notice of Motion under Informa Pauperis Provision for Free Transcript of all Proceedings had hereof. Filed.

Mar. 1 Order Denying Motion. Filed. Certified copy sent to Petitioner. 1 copy to Dist. Atty. 1 copy to H.V. Field, Supt. CMC.

Mar. 14 Copy of Petition for Writ of Certiorari received for transmittal to Judge T.I. O'Reilly.

Apr. 20 Copy of Petition for Hearing, Supreme Court of the State of Calif. Received.

Apr. 21 Petition for Writ of Habeas Corpus. Filed.

Apr. 21 Memorandum Denying Writ of Habeas Corpus. Filed. Certified copy sent to Petitioner. One copy to Dist. Atty. One copy to H.V. Field, CMC (Harris)

June 5 Copy of "Petition for Writ of Certiorari, in Forma Pauperis", to U.S. Supreme Court. Received.

July 5 Petition for Writ of Habeas Corpus. Filed.

July 5 Order Denying Writ. Filed. Certified copy to Petitioner. One copy to Dist. Atty. One copy to H.V. Field, Supt. CMC (Harris)

July 18 Motion to Vacate Order and for Leave to Amend Petition. Filed.

July 18 Order Denying Motion. Filed. Certified copy to Petitioner. One copy to Dist. Atty. One copy to H.V. Field, Supt. CMC (Harris)

1968

Feb. 16 Copy of Order of Court of Appeal, First Appellate District, denying Petition for Writ of Mandate is received.

May 10 Certified copy of Order of Supreme Court of United States granting Petition for Writ of Certiorari. filed.

1968

June 13 Proceedings of December 22, 1966. filed.

June 13 Proceedings upon Hearing of February 1, 1967. filed.

July 11 Petition for Writ of Habeas Corpus. filed (Petition sent to Office of the Atty Gen for response 7-11-68)

Aug. 12 Response to Petition for Writ of Habeas Corpus, w/clerk's transcript, Reporter's transcript on Appeal; Volume I-pages 1 to 237 & Reporter's Transcript on Appeal; Volume II-Pages 238 to 418. filed.

Aug. 12 Copy of Petitioner's Brief in the Supreme Court of the United States. Received.

Aug. 26 Proceedings of October 17, 1966. filed.

Aug. 30 Petitioner's Traverse to Attorney General's Response. Filed.

Aug. 30 Order Denying Petition. Filed. Certified copy to Petitioner. Certified copy to Jack Weber, Deputy Atty General. One copy to Dist Atty. Certified copy to C.J. Fitzharris, Supt. (CTF at Soledad) (Harris)

JAMES W. POWELL
District Attorney
San Luis Obispo County
Courthouse Annex
San Luis Obispo, California
Telephone: 543-1550

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

No. 5101

Endorsed, Filed, Oct. 13, 1966, A. E. Mallagh, County Clerk, By Josephine Carrazanh, Deputy Clerk.

In the Matter of the Application of
ROBERT NEWTON GARDNER, JR.
for a Writ of Habeas Corpus

ORDER TO SHOW CAUSE RE PETITION FOR WRIT OF HABEAS CORPUS AND ORDER FOR PRODUCTION OF PRISONER

TO: H. V. FIELD, Superintendent, California Men's Colony, Los Padres, California

YOU ARE HEREBY ORDERED TO APPEAR before the above-entitled Court, in Department 1 thereof, in the Courthouse Annex in the City of San Luis Obispo, California, at the hour of 2:00 P.M. on the 17th day of October, 1966, then and there to show legal cause, if any you have, why the petition of ROBERT NEWTON GARDNER, JR. for issuance of a Writ of Habeas Corpus should not be granted.

IT IS FURTHER ORDERED that you produce at such hearing all records in your custody or under your control that pertain to said Petitioner's commitment to the Department of Corrections of the State of California and/or the California Men's Colony, Los Padres, California.

IT IS FURTHER ORDERED that you produce said Petitioner on said date at the aforesaid time and place to act as a witness in connection with his application for a Writ of Habeas Corpus.

YOU ARE FURTHER COMMANDED to deliver said Petitioner into the custody of the Bailiff of this Court, Department 1 thereof, on the 17th day of October 1966, at the hour of 2:00 P.M., and any further proceedings.

Dated this 13th day of October, 1966.

/s/ Richard F. Harris
Judge of the Superior Court

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

(Court)

No. 5101

(To be supplied by Clerk of the Court)

Endorsed, Filed, Nov. 16, 1966, A. E. Mallagh, County Clerk, By [Illegible], Deputy Clerk.

ROBERT NEWTON GARDNER, JR.

(Petitioner)

vs.

H. V. FIELD, Superintendent California Mens Colony, Los Padres, California

(Respondent)

Petition for Writ of HABEAS CORPUS

(Title of writ)

Name of person in custody:

_____

(If other than petitioner)

Relationship of petitioner to person in custody:

_____

INSTRUCTIONS—READ CAREFULLY

Set forth in concise form the answers to each applicable question. If you do not know the answer to any question, you should so state. If necessary, you may finish the answer to a particular question on an additional blank page,

---

Approved by the Judicial Council of California for use under Rules 56.5 and 201 (f) of the California Rules of Court [as adopted effective Jan. 1, 1966].

but make it clear to which question any such continued answer refers.

You should exercise care to assure that all answers are true and correct. Since the petition contains a verification, the making of a statement which you know is false may result in a conviction for perjury.

When the petition is filed with the Superior Court or judge thereof, only the original must be filed unless additional copies are required by local court rules.

When the petition is filed with the District Court of Appeal or justice thereof, an original and three copies must be filed.

When the petitioff is filed with the Supreme Court or justice thereof, an original and ten copies must be filed.

In addition, the law requires the service of a copy of the petition on the district attorney, city attorney or city prosecutor in certain cases (Pen. Code § 1475, Gov. Code § 72193).

Petitioner should attach all relevant records or documents supporting his claims.

1. ROBERT NEWTON GARDNER, JR., A-28381 in
(Name of person in custody)

whose behalf the writ is applied for is confined or restrained of his liberty at CALIFORNIA MENS
(Place of detention)

COLONY-EAST by H. V. FIELD, Superintendent,
(Name of person or persons having custody—if names not known describe such person or persons)

Los Padres, California 93401 _____

_____

2. Name and location of court under whose process person is confined:

Superior Court, County of Orange, Santa Ana, California _____

_____

_____

3. Nature of the court proceeding (e.g., criminal case, commitment for narcotics addiction, insanity, or mentally disordered or abnormal sex offender) and the case number, if known, resulting in the confinement: Criminal Case C-10451, commitment for violation 11500 Health & Safety Code, possession of narcotics. 6 months to 10 years, 1st time narcotics with Parole Violation on 1954 Robbery Term. (second termer overall) _____

4. The date of the judgment, order or decree for confinement and its terms: February, 1960, sentenced to state prison for six months to ten years. That sentence runs concurrently with the Parole violation.

_____

5. What plea was entered in the above proceeding? (E.g., guilty, not guilty, not guilty by reason of insanity, nolo contendere, etc.)

plea of guilty. _____

_____

6. Check whether trial or hearing was by

(a) ☐ A jury
(b) ☒ A judge without a jury

7. Was an appeal taken? No. At that time (1960) no appeal would lie from a plea of guilty.

8. If you answered "yes" to (7), list

(a) The name of each court to which an appeal was taken:

i _____
ii _____
iii _____

(b) The result in each such court:

i _____
ii _____
iii _____

(c) The date of each such result and, if known, citations of any written opinions or orders entered:

i _____

ii _____

iii _____

9. If the answer to (7) was "no" state the reasons for not so appealing:

No appeal would lie from a plea of guilty at that time. _____

_____

10. State concisely the grounds on which you base your allegation that the imprisonment or detention is illegal:

(a) See pages 1 and two of Supplement to this form. (annexed hereto) _____

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See Supplement to Writ Form, pages 3 on. ____

(b) _____

(c) _____

12. Have any other applications, petitions or motions been filed or made in regard to the same detention or restraint? Yes _____

13. If you answered "yes" to (12), list with respect to each petition, motion or application:

(a) The specific nature thereof:

i Petition For Writ of Coram Nobis, C-10451, Trial Court _____

ii Petition for Writ of Habeas Corpus as to C.S. sentence _____

iii Petition for writ of Habeas Corpus, No. 4319, Solano Co. relating to roadblocking and interference of legal mail and the like by prison officials _____

iv _____

(b) The name and location of the court in which each was filed:

i Superior Court, Orange County, Santa Ana, California

ii Solano County Superior Court, Fairfield, California

iii Solano County Superior Court, Fairfield, California

iv

(c) The disposition thereof:

i Denied. See Supplement as to additional information

ii Granted. Sentence ordered to run concurrently

iii Denied as respondents allegedly ceased interference

iv

(d) The date of each such disposition:

i May 16, 1964, DCA Oct. 20, 1965, 384 US —— Cert. Denied June 20, 1966

ii November 1963

iii November 1963

iv

(e) If known, citations of any written opinions or orders entered pursuant to each such disposition:

i GARDNER v. CALIFORNIA, Misc. 1636, Oct. Term 1965, 384 US ——

ii Unreported

iii unreported

iv

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application? No, except for small part presented in 13, iii

15. If you answered "yes" to (14), identify:

(a) Which grounds have been previously presented:

i interference with legal mail and access to the courts as shown in answer to question 13, iii

ii _____

iii _____

(b) The proceedings in which each ground was raised:

i _____

ii _____

iii _____

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) The situation in the instant case is unusual in that the Petitioner is not claiming deprivation of any constitutional right during trial or up to an including judgment of conviction _____

(b) Petitioner contends that acts, ommissions, and denial of constitutional rights which have taken place after judgment, has caused him to be entitled to discharge from custody. Jurisdiction is based on Penal Code, section 1485, Part 2 _____

(c) The cause of action did not arise until recently _____

17. In the proceeding resulting in the confinement complained of, was there representation by an attorney at any time during the course of:

(a) The proceedings prior to trial? Yes _____

(b) The trial or hearing? Yes _____

(c) The sentencing or commitment? Yes _____

(d) An appeal? No appeal _____

(e) The preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction? No, except on appeal of coram nobis in trial court _____

18. If you answered "yes" to one or more parts of (17), list the name and address of each such attorney and the proceeding in which he appeared:

(a) Robert W. Armstrong, Pacific Blvd., Huntington Park, Calif. Proceedings prior to trial, trial, sentencing _____

(b) Gareld J. Orman, Deputy Public Defender, Orange County, Santa Ana, California. Coram nobis—on appeal to DCA _____

_____

(c) _____

_____

19. Is the person in custody presently represented by an attorney in any matter relating to this confinement? No _____

If so, state the attorney's name and address: _____

_____

20. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

This is first court of proper jurisdiction _____

_____

_____

I, the undersigned, say:

I am the petitioner in this action; the above document is true of my own knowledge, except as to matters that are stated in it on my information and belief, and as to those matters I believe it to be true.

Executed on October 30, 1966 at Los Padres, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
A-28381

ROBERT NEWTON GARDNER, JR.
A-28381
California Mens Colony-East
Los Padres, California 93401

Petitioner in prioria persona

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

Case No. 5101

ROBERT NEWTON GARDNER, JR., PETITIONER

- *vs.* -

H. V. FIELD, Superintendent, California Mens Colony-East Facility, Los Padres, California, RESPONDENT

SUPPLEMENT

SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS WRIT FORM UNDER RULES 56.5 AND 201 (f)

Answers pertaining to question number 10.

ALLEGATIONS

I

Petitioner alleges that the wilful or negligent failure of the Superior Court Clerk to provide this indigent petitioner with a copy of his trial transcript, when ordered to do so by a Court, deprived him of due process and equal protection of the law as secured by the Fourteenth Amendment to the United States Constitution.

II

Petitioner alleges that the failure of the State of California through its agents to afford petitioner his transcript, when ordered to do so by a Court, severely preju-

diced his cause and denied him a timely, meaningful and proper coram nobis hearing and caused the appeal therefrom to be inadequate and meaningless, which resulted in irreparable damage to his cause, and as such, violated petitioner's rights to due process and equal protection as secured by the Fourteenth Amendment.

III

Petitioner alleges that the State of California, through its prison officials, has denied petitioner adequate access to legal materials, law books, post-conviction review, appellate review, and the right to have meaningful hearings in the Courts. The aforesaid due to the fact that the prison officials have arbitrarily confiscated or destroyed legal documents, notes, records, partially prepared habeas corpus petitions with annexed exhibits, and have denied petitioner timely and reasonable access to the mails and the courts, and as such, have caused petitioner to be deprived of his liberty in violation of the equal protection clause of the Fourteenth Amendment. Moreover, the State of California through its prison officials have denied petitioner the equal right afforded to all persons convicted of crime in California to meaningfully prosecute a petition for writ of coram nobis, other post-conviction remedies, and appeals therefrom.

IV

Petitioner alleges as a result of Allegations I, II, and III, as above set forth, he has been subjected to long delays and forced into prolonged litigation, which have severally prejudiced his chances of parole with the Adult Authority and caused him to serve an excessive term of imprisonment, as punishment, more onerous than the law allows solely because petitioner has exercised or attempted to exercise his Federal Civil and Constitutional Rights.

V

Petitioner alleges that the proximate result of the aforesaid deprivations has caused the petitioner to be subjected to cruel and unusual punishment, and has denied him

due process and equal protection, privileges, and immunities, in violation of the Eight and Fourteenth Amendments, and as a result thereof has deprived petitioner of substantive rights under the laws and Constitutions of the State of California and the United States of America, and as such, entitles him to discharge from custody upon petition for writ of habeas corpus.

Answers pertaining to question number 11.

STATEMENT OF FACTS

I

The State of California and the Respondent herein have access to and custody and control of the complete file and record of the Petitioner, PEOPLE v. ROBERT N. GARDNER, JR., Cr. No. C-10451, In the Superior Court of the State of California, In and for the County of Orange. That file and record will show the following: (See Exhibits, Groups III, IV, to be submitted.)

That on December 10, 1959, the petitioner was arrested and incarcerated in the Santa Ana County Jail, Orange County, California. Several proceedings were had in the matter during the months of January and February of 1960. The petitioner was tried, convicted and sentenced to state prison during that period for violation of 11500 Health and Safety Code, possession of narcotics, with no prior narcotics conviction. Petitioner was continuously physically incarcerated either in jail or state prison from December 10, 1959, to the date of the filing of the present petition for writ of habeas corpus.

On March 9, 1960, the petitioner mailed an informal notice of appeal to the trial court. However, the County Clerk alleges that the notice was not received or not filed. (See Clerk's Transcript on Appeal, page 230, lines 20 to 23; Appellant's Opening Brief on Appeal, page 3, lines 20 to 22.)

On July 18, 1960, petitioner filed in the trial court his Motion for the procurement of the record without prepayment of any fees. On July 22, 1960, the Honorable R. M. Crookshank, Department 5, Superior Court, County

of Orange, granted the petitioner's motion for portions of the record to allow petitioner his right as an indigent to prepare and present a meaningful collateral attack on the judgment by avenue of coram nobis or habeas corpus based on the ground and reasons spelled out in that motion. The inference of petitioner's need of transcripts must be drawn from the issuance of court orders compelling the Clerk to prepare and produce the said transcripts for the indigent petitioner. Throughout the hearing of July 18, 1960, wherein the motion as aforesaid was granted, the State of California was duly represented by their agents, Deputy District Attorney DEWITTE CHATTERTON (hereinafter CHATTERTON) and Deputy Superior Court Clerk ROBERT K. HENSON (hereinafter HENSON). (See Order Granting Motion, Entered August 4, 1960; Register of Actions in C-10451; Clerk's Transcript on Appeal, page 230, lines 23 to page 231, line 3; Appellant's Opening Brief on Appeal, page 3, Ll 22 to 25.) (Also See Group III, No. 1, 2, 3.)

The above mentioned Court Order Granting Petitioner's motion for transcripts as an indigent and compelling Superior Court Clerk HENSON to prepare and present same to petitioner was entered August 4, 1960. The Superior Court Clerk did not notify the petitioner that said motion was granted, nor did he prepare said transcripts as ordered by the Court. The petitioner did not receive the transcripts, nor any communication whatever from the Clerk regarding the above matter from the date of that hearing, July 18, 1960, to the date of the filing of the instant petition for writ of habeas corpus, notwithstanding the numerous letters of inquiry addressed to the Clerk from petitioner regarding his case. (See File of County Clerk in C-10451; Reporter's Transcript on Appeal, Friday Oct. 23, 1964, page 40, lines 4 to 13; Clerk's Transcript on Appeal, pages 230, lines 23 to page 231, line 10; Appellant's Opening Brief, pages 3, lines 22 to page 4, line 6; Register of Actions in C-10451; Carbon copies of petitioner's letters; Also see petitioner's Prison Mail Record Card.) (See Exhibits, Group III, Numbers 1, 2, and 3.)

On July 2, 1963, petitioner renewed his Motion for the procurement of the record as an indigent. The judge denied that motion stating, "the court considered the written motion as well as all previous proceedings in this matter." The previous proceedings would show the earlier granting of the same motion, entered August 4, 1960, which was still unknown to petitioner. (See Order of the Court entered August 4, 1960, in Book 113, page 603; Order of the Court entered July 5 1963 in Book 181, page 600.) (See Exhibits, Group III, Numbers 1, 2 and 3.)

On July 10, 1963, petitioner received an Order of the Court denying his motion of July 2, 1963. Within four (4) hours of receiving that Order the petitioner mailed a notice of appeal to the Superior Court Clerk. The Clerk notified the petitioner that the notice of appeal was received too late and not filed. (See Order of the Court entered July 5, 1963, Book 181, page 600; Clerk's Transcript on Appeal, page 231; Appellant's Opening Brief, page 3 and 4; Copy of Notice of Appeal; Clerk's letters to petitioner.)

On March 12, 1964, petitioner first became aware of the motion for the records having been granted previously by the Court on July 22, 1960. In March 1964, petitioner first purchased a certified copy of the Court's Register of Actions, which set forth the granting of the above mentioned motion, and petitioner subsequently purchased copies of the earlier Order granting petitioner's necessary and needed transcripts. (See Carbon copies of letters of Petitioner to Court Clerk; Letters from County Clerk; Dates of Certification of petitioner's copy of Register of Actions, dated March 12, 1964 and Order Granting Motion, dated as a certified copy on April 10, 1964; County Clerk's Book 113, page 603.)

II

Petitioner incorporates page 3, line 16 to page 6, line 9, inclusive, of the Supplement herein by reference thereto as fully set forth in this portion of the Statement of Facts.

By May, 1964, petitioner was able to procure meager records through the aid of relatives, to enable him to attempt to present his petition for writ of coram nobis to the trial court. An appeal from the judgment did not lie at that time as petitioner had entered a plea of guilty and a petition for writ of coram nobis was the proper avenue to seek relief, and held as such by the District Court of Appeal. That petition for writ of coram nobis was presented to the trial court in propria persona and as an indigent on May 16, 1964. On October 29, 1964, after an *in absentia* hearing, that petition was denied without opinion, finding of fact, or conclusions of law. (Appellant's Opening Brief, page 1, lines 14 to 19.)

On October 14, 1965, in appellate case 4/Crim. 2153, during oral argument of counsel before the District Court of Appeal in San Bernardino, California, the Public Defender, representing petitioner, while presenting the merits of petitioner's cause and the remedies pursued by petitioner, was interrupted by Justice Coughlin, who stated, "except he didn't do it for four years." (People v. Gardner, 4/Crim. 2153. Arguments before the Fourth District Court of Appeal on October 14, 1965, Court Reporter's Transcript, page 2, line 23.)

On October 20, 1965, the District Court of Appeal affirmed the lower court's denial of petitioner's petition for writ of coram nobis. In that Opinion the Court stated as a contributing factor of its affirmation, "The long delay in asserting these facts is not reasonable excused." The record in that court did show that petitioner presented the reasons for the delays and among those was the act of the Superior Court Clerk HENSEN in his failure to provide transcripts as ordered by the Court. (See Opinion of the District Court of Appeal, 4/Crim. 2153, page 3, lines 4 to 5; Appellant's Opening Brief, pages 3 and 4; Clerk's Transcript on Appeal, pages 230 to 232.)

On June 20, 1966, the United States Supreme Court denied petitioner's petition for writ of certiorari in the matter of ROBERT NEWTON GARDNER, JR., v. CALIFORNIA, No. 1636 Misc., Oct. Term, 1965, 384 U.S. ——. Mr. Justice Douglas was of the opinion that the petition for writ of certiorari should be granted and the judgment below vacated.

III

Petitioner incorporates page 3, line 16, to page 7, line 19, inclusive, of the Supplement herein by reference thereto as fully set forth in this portion of the Statement of Facts herein.

In addition to the above listed denial of meaningful access to the courts and the right to properly prepare and present petitions seeking redress, the petitioner will show upon hearing that the State of California through its prison officials have denied petitioner three (3) separate appeals by wrongful delay of legal mail. That he has been denied adequate access to legal materials, law books, post-conviction review, appellate review, and the right to have a meaningful hearing in any court whatever.

Over the past several years the petitioner has been seeking redress in various courts with respect to his judgment of conviction. He has accumulated a large amount of irreplaceable notes, records, documents, transcripts, exhibits, and the like. The petitioner is informed and believes, and therefore states, that he now has sufficient evidence to show wilful and knowing use of perjury by the prosecution, among numberous other constitutional violation, during trial and post-conviction proceedings held *in absentia*. The aforesaid acts were committed by the arresting officers, prior to, during, and after judgment. The arresting officer in charge was William Madden, when Captain of Los Angeles City Police, now member of the Adult Authority, Department of Correction. (See Exhibits, Group III, No. 5, 6, 7.)

Petitioner will show upon hearing that on November 4, 1963, he presented a petition for writ of habeas corpus, number 4319, Solano County Superior Court, wherein he did show that upon preparation for judicial review of his case, and after the appointment of William Madden, arresting officer in charge, to the Department of Correction, that petitioner was subjected to "Special Regulations and Restrictions" resulting in a "merry-go-round" with respect to all legal mail and material. In one instance a letter to an agency of the United States Government, which had important information directly relating to his case, required 27 days to travel from Vacaville to San

Franscisco, California. Other letters to the Clerk of the United States Supreme Court, Superintendent of Documents, and to counsel, have required up to 67 days before delivery. (Habeas Corpus No. 4319 with Exhibits will be presented to this court upon hearing.)

During the first part of August, 1966, while at the Medical Facility at Vacaville, California, petitioner had two partially prepared petitions for writ of habeas corpus with exhibits and related notes. One of those petitions was directed to the Solano County Superior Court attacking the wilful and knowing use of perjured testimony by the prosecution. Immediately prior to the preparation of those petitions, the petitioner was denied a previous institution initiated request for transfer by the Director of Corrections, and confirmed by the Full Classification Committee at the Medical Facility. That action assured petitioner that he would not be transferred, under normal policy, for at least six months. Petitioner was therefore assured that he had six months to prepare and present his petitions without transfer and loss of jurisdiction problems. (See Exh. Grp. I, No. 9, 10, 11, 13)

On August 18, 1966, Judge Leon Yankwich, U.S. District Court, Central District of California, granted the petitioner leave to prosecute a Civil Rights Complaint, 42 U.S.C. 1983 and 1985, involving the District Attorney Kenneth Williams and County Clerk William St. John, and their deputies, of Orange County. The Petitioner is informed and believes, and therefore states that upon the District Attorney, Kenneth Williams, et al, being served with Federal Summons in the above matter, the District Attorney communicated with the Director of Correction, Walter Dunbar, and an immediate transfer situation was initiated under color of institutional convenience. That transfer was set up for the "Special Treatment" to be afforded the prisoner and his legal material. (See Exhibits, Grp. I, No. 9, 10, 11, 12, 13, 23, and 25.)

On August 29, 1966, the petitioner was transferred to the California Mens Colony-East, Los Padres, California, without sufficient notice or time to prepare, pack, and to send home any surplussage. (See Exhibits, Grp. I, No. 10, pp. 3-5; 12, 23, 25.)

Upon arrival at the California Mens Colony and for five weeks thereafter, petitioner was denied all legal material, notes, records, and even blank legal paper. This was while petitioner was and presently is actively in Federal Court prosecuting a civil rights complaint for damages. During that five week period, all of petitioners, legal material and most of his personal property was subjected to systematic pilferage, destruction, and/or confiscation of the most important legal materials, notes, records, exhibits, original documents, irreplaceable instruments, books, formats, and the like, all relating to past, present, and future court actions. (See Exhibits Grp. I, No. 10, pp. 1 to 5.)

On October 4, 1966, limited property of an expendable nature, such as, blank legal paper, copies of very old notes, petitions, and letters, was afforded the petitioner. That property or at least most of that property would have been separated prior to transfer and sent home as surplussage, providing, the petitioner would have had sufficient time to pack and prepare prior to his transfer. (See Exhibits, Grp. I, No. 10, 11, 13, 25, & In re 5101.)

The material, all of legal nature, now remaining in the custody and control of the respondents has taken the petitioner years to accumulate, due to being indigent, and that material is extremely important and necessary to afford petitioner his rights to a meaningful preparation, presentation, and access to the courts. It must be remembered that all the material is lawfully and rightfully the petitioner's, either personally typed copies of court records, legal notes, photographic copies of court records, transcripts, copies of records afforded by attorneys and courts, and irreplaceable original exhibits, documents, and depositions. Moreover, all law books, rules of court, rules of procedure, and the like, not available in the State Library or institution library, have been confiscated or destroyed. All of the aforesaid property was duly authorized by the sending Superintendent and recognized as such by the sending Receiving and Release Sergeant, with records and property slips showing authorization and the date of petitioner's purchase or proper receipt thereof. (The statements made in part III will be substantiated

upon hearing. Witnesses, exhibits, letters, and reference to records will be available. Reference to witnesses by name will not be made at this time as it may result in threats, intimidation, transfer, and the like. Reference to records, documents, exhibits, and the like will be made— the location thereof, will not be made at this time as the Respondents, and other prison officials, in the past have confiscated and/or destroyed legal exhibits, transcripts, and other property legal in nature, as a result of allowing them access thereto. (See Exhibits, Group II, No. 4, 5, 6, and No. 1, 2, and 3; Group I, No. 25, 27, and 10; Group III, No. 5, No. 6 pp. 29, 30, and 31; and Petition for Injunctive Relief, Case No. 5101, presently pending before this Court.)

For over 52 months the petitioner was denied any communication whatever with the counsel of his choice, a Mr. Marshall Krause of San Francisco, California. (See Exhibits, Group I, Numbers 1, 2, 3, 4, 5, 6, 7, 8, and 9.)

For over 80 months it has been and is now the policy of the prison officials to deny privileged communication with any court or counsel whatever. (See Exhibits, Group I, No. 27 and 28; Group II, Numbers 1, 2, and 3; Group III, No. 6 pp. 29, 30, 31; and Group III, No. 5.)

For over 80 months the petitioner has been severely restricted and at times totally denied the right to communicate with counsel, the courts, United States Attorney, U.S. Civil Rights Department, The Presidential Committee on Civil Rights, and numerous other avenues of correspondence. When access to the courts or counsel is allowed, it is delayed to such a degree that petitioner has been irreparably damaged as to his cause, such as being foreclosed as to three (3) appeals, due to excessive delays. Each act is an intentional act to deprive petitioner of access to courts and meaningful means to prepare and present petitions seeking redress. (See Exhibits, Group II, No. 1, 2, 3, 4; Group IV, Exh. G and A, pp. 1 to 5; Group III, No. 5, and No. 6, pp. 29 to 31.)

As hereinabove shown, the petitioner has been denied for more than 52 months meaningful access to counsel, courts, and to legal reference and procedural material, and legal court records. Upon finally obtaining necessary

law books, transcripts, exhibits, formats, accumulated notes, and other important legal material, the petitioner was subjected to respondent's "Special Treatment" afforded to "Writ Writers" and transferred to another institution where all his property was confiscated for 5 weeks, during which time a Mr. R. R. Lucas, Classification and Parole Representative acting for respondent, systematically stripped, pilfered, destroyed, or otherwise denied him the important transcripts, exhibits, notes, reference and procedural material, and all law books, rules of court, formats, and other necessary material not available in the institution or state libraries, or at least, the above material has never been available to petitioner in the past. Recent directives from the Director of Corrections show that the aforesaid actions of respondents will continue to be his policy. Now after more than 80 months of attempting review of his case, the petitioner has been, is now, and will be continuously foreclosed all possibility of ever obtaining an adequate and meaningful post-conviction review of his case. The aforesaid was, is, and will be due to the wilful acts and omissions of the respondent and other subordinate prison officials in their knowing and intentional abridgment of petitioner's State and Federal Constitutional Rights. (See Exhibits, Group I, No. 10; Group II, Numbers 7, 8, and 9 to 34, inclusive.)

In all medium and maximum security prisons in this state, the legal section of the library has had the United States Codes, Rules of the Federal District Court, Federal Criminal Procedure, Federal Civil Procedure, and the like. This has been so due to the fact that the aforesaid legal books are not available to a prisoner by order from the State Law Library in Sacramento.

It is a well established fact that the petitioner has a federal constitutional right to petition the federal courts for a writ of habeas corpus, to appeal from any denial therefrom, to seek a petition for writ of certiorari in the United States Supreme Court, and to invoke provisions of the Civil Rights Acts of both Title 18 and 42 of the United States Code. The removal and destruction of, and total denial of access to, the United States Codes, Rules, and Civil and Criminal Procedure, denies petitioner a ade-

quate and meaningful preparation and presentation of federal remedies that are guaranteed him by the Federal Constitution. The above is true for any state or federal prisoner and incompasses any abridgment upon those rights secured.

On September 19, 1966, a Transmittal Letter, 26, 66, from the Director of Corrections, Walter Dunbar, was issued to all Wardens, with respect to changes in the Department of Corrections Administrative Manual. In that Transmittal Letter the list of the newly approved law books and codes were set forth. The United States Codes and all other Federal Rules and the like as listed in the above paragraphs were excluded. That exclusion was spelled out in paragraph 330.04. Also in that letter, the order is given that, ". . . All existing law books and reference material in inmate law libraries not consistent with this section *are to be removed and destroyed* . . ." "Par. 330.045 *is added to preclude personally owned law books and to generally exclude personally owned copies of opinions and decisions.*" Further reference is made excluding any and all reference material, legal publication, California and Federal legal newspapers, and the like. The only legal material authorized by the new changes in the Administrative Manual, is as set forth in Par. 330.045, "inmates may receive or purchase a single copy of an opinion or decision in their own case (Commonly known as slip-opinion) and retain it in their own possession. (See Exhibits, Group II, No. 16.)

The State Library will not loan the United States Codes, Federal Criminal and Civil Procedure, or Rules of the Federal District Court. The above Administrative Order forecloses the petitioner's right to have any meaningful access whatever to those basic codes and rules. Moreover, for a prisoner who has never had a decision in his case, he is forever foreclosed and denied all legal notes, reference material, slip-opinions, U.S. basic codes and rules, and the like as heretofore listed.

Considering the strict enforcement and expanded scope afforded all of the Director's Rules restricting legal work by the officials of this institution, even all hand-written or typed notes on opinions, decisions, and case law rele-

vant and important to a man's cause will be confiscated and/or destroyed as contraband as the petitioner's legal material and property has been done at this institution since his arrival.

It is interesting to note and it seems rather coincidental that the above Transmittal Letter was sent down by the Director shortly after the heated statements were made to newspapers and over radio with respect to cruel and unusual punishment within the California Prison system by Federal District Judge Harris and the reply thereto by the Director of Correction regarding the *Jordon* vs. *Fitzharris* decision (August 1966); and, in regard to the Petitioner's case, during this same period, the communication between the District Attorney of Orange County and Director, Walter Dunbar, with respect to the civil rights suit for damages. (Verification of any statement above presented is available to the Court upon the denial of that statement by the respondents.)

IV.

Petitioner incorporates page 3, line 16, to page 12, line 27, of the Supplement herein by reference thereto as fully set forth in this portion of the Statement of Facts.

Petitioner states, upon review of the above Statement of Facts, that it is clear that he has been subjected to long delays and forced into prolonged litigation, which has foreclosed many constitutional issues due to the retroactivity question having been resolved adversely to petitioner's cause. Search and Seizure was a main issue in the coram nobis proceeding. The arrest and trial of petitioner was subsequent to Miss Mapp's in *Mapp* vs. *Ohio*. Petitioner's motion for records and the granting of that motion was prior to the decision in *Mapp*. Petitioner was severely prejudiced by the delay as previously set forth as he would have been able to present the issue in his case prior to the *Mapp* decision, providing, he would have been afforded his constitutional rights as to transcript when ordered by the court.

Upon review of the coram nobis proceedings, the main issue and reason for the affirmation of the lower court's denial of that coram nobis was the delay as to the appli-

cation, and the delay in presenting the Search and Seizure issue as *Linkletter* v. *Walker* was decided a few days prior to the decision of the District Court of Appeal. Retroactivity would not be a question if the petitioner would have been able to timely present his petition, and even so, the Ninth Circuit prior to *Linkletter* held the *Mapp* opinion retroactive. It is clear that petitioner would have been discharged from custody had he been afforded his constitutional rights and not been delayed, harrassed, oppressed, and denied meaningful access to the courts by acts of prison officials and the County Clerk.

The record will show that petitioner has been forced into prolonged litigation, which has prejudiced his chances of parole. Especially so, when petitioner was forced to attack the arresting officers to show the illegality of petitioner's trial, and when the arresting officer in charge now exercises a high seat of power within the Department of Corrections as an Adult Authority member. Moreover, it is common knowledge that prisoners seeking redress in the courts, while as an indigent and in propria persona, will incur the wrath of the prison officials and the Adult Authority, and especially so, under the special circumstances of this case. A prisoner, under the circumstances as set forth in this case, will do an execessive term of imprisonment solely as punishment for exercising or attempting to exercise his federal civil and constitutional rights.

The petitioner is 43 years old. He was sentenced to a term of 6 months to 10 years for narcotic possession without prior narcotic convictions and as a second termer overall. He was eligible for parole in 1960 and discharge in 1962 under his present legal status. He has an above average work and disciplinary record. He was recommended for parole in 1962 by the Staff Psychiatrist of the California Medical Facility. He has been recommended for minimal time by other high officials more familiar with his case then the present prison officials. It must be remembered that petitioner has shown that he has attempted to present petitions showing perjury by the arresting officers. The arresting officer in charge is William Madden, presently a member of the Adult Authority and

in a seat of power wherein he is able to demand that his statements as presented during and subsequent to the arrest of petitioner be accepted as true. Every act of the petitioner and every stage of his preparation for redress is available to Mr. Madden. Many documents, which would show perjury and other criminal acts committed by arresting officers have now been wrongfully confiscated or destroyed.

Moreover, the petitioner has now served 80 months in prison for his offense. The average term for possession of narcotics without prior narcotics conviction and as a second termer is less than 50 months, and that average does not include cases with recommendations for early release. It is clear that the petitioner, under the special circumstances of this case, has been caused to serve an excessive term of imprisonment solely because petitioner has exercised or attempted to exercise his federal civil and constitutional rights. (The aforesaid may be substantiated by the records of the respondents, other agencies, and testimony by individuals concerned. In addition, petitioner has records and depositions outside of this institution, now unavailable to petitioner, but will be presented upon hearing.)

V

Petitioner incorporates page 8, line 16, to page 15, line 8, inclusive, of the Supplement herein by reference thereto as fully set forth in this portion of the Statement of Facts herein.

It is clear that coercion, cruel and unusual punishment, and the like, can be inflicted upon a person without resorting to the physical tortures, but by the use of psychological means, such as frustrations, threats, oppression, coercion, and continuous denial of known constitutional rights.

Petitioner asserts that upon review of the above and the overall record and aspects of his case, that an obvious cruel and unusual punishment situation will be shown. Petitioner has been subjected to cruel and unusual punishment in violation of the Eight Amendment, and has been denied due process, equal protection, privileges, and im-

munities, in violation of the Fourteenth Amendment, and as a result thereof he has been deprived of substantive rights under the laws and Constitutions of the State of California and the United States of America, and as such, he is entitled to discharge from custody upon petition for writ of habeas corpus.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Petitioner in propria persona

DATED, 30 October 1966
Los Padres, California

VERIFICATION

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN LUIS OBISPO)

I, ROBERT NEWTON GARDNER, JR., the undersigned, say:

I am the petitioner in this action; the above entitled document, a petition for writ of habeas corpus and the annexed Supplement, pages 1 to 18, is true of my own knowledge, except as to matters that are stated in it on my information and belief, and as to those matters, I believe to be true.

EXECUTED on the 30th of October, 1966, at Los Padres, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Affiant and petitioner

ROBERT NEWTON GARDNER, JR.
A-28381
California Mens Colony-East
Los Padres, California

Petitioner in prioria persona

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

Habeas Corpus Case No. ——

ROBERT NEWTON GARDNER, JR., PETITIONER

- vs. -

H. V. FIELD, Superintendent, California Mens Colony-East, Los Padres, California, RESPONDENT

BRIEF OF POINTS AND AUTHORITIES

BRIEF OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION

I

Petitioner was deprived of due process and equal protection of the laws as secured by the Fourteenth Amendment by the wilful or negligent failure of the Superior Court Clerk to provided him with a copy of his trial transcript, when ordered to do so by a Court.

"Court stenographer who wilfully or negligently fails to provide an indigent with a copy of his trial transcript, when ordered to do so by a court, deprives indigent of his federally protected rights under color of law." 42 U.S.C.A. 1983

Laurence Thomas Washington vs. *Official Court Reporter*, 251 F. Supp. 945, March 30, 1966, U.S.D.C., E.D. of Penn., 34 B.N.A. Law Week 2546, March 30, 1966.

II

The failure of the State of California through its officials to afford petitioner his transcripts, when ordered to do so by a Court, prejudiced his cause and denied him a timely, proper, and meaningful coram nobis hearing and caused the appeal therefrom to be inadequate and meaningless, which resulted in irreparable damage to his cause, and as such violated petitioner's right to due process and equal protection as secured by the Fourteenth Amendment.

"Equal Protection Clause requires a transcript to be furnished an indigent free of charge, and right to transcript is equally applicable if notes are needed to prepare collateral attack on the conviction." and,

"While refusal to furnish a transcript without a showing of need for it is no deprivation of an indigent's civil rights, inference of need may properly be drawn from issuance of previous court orders compelling the production of transcripts."

Washington v. *Court Reporter*, supra, 251 F. Supp. 945, 946, 34 B.N.A. Law Week 2546, March 30, 1966.

"Petitioner claims he was deprived of his liberty in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. He claims that the State of Indiana (California) through it prison officials (and court officials) denied him the equal right afforded to all persons convicted of crime in Indiana (California) to prosecute an appeal . . . (coram nobis petition and appeal therefrom) . . ." and

"The Indiana (California) State Constitution guarantees the right to appeal (coram nobis and appeal therefrom) in all cases reviewed regardless of the chance for a reversal. We hold that when petitioner was denied the right to appeal (coram nobis and appeal) within the statutory period (California's coram nobis is limited as to time), he was deprived of a substantial right . . ." (Parenthesis added)

U.S. ex rel. Cook vs. *Dowd*, 340 U.S. 206, 7th Cir. (1950)

"The probability of petitioner's prosecuting a successful appeal (coram nobis and appeal therefrom) is not a proper consideration in determining whether a writ of habeas corpus should issue and whether a discharge should be granted." (parenthesis added)

U. S. ex rel. Cook v. *Dowd*, 340 U.S. 206 (1950)

III

The acts and omissions of the State of California through its prison officials have deprived petitioner of the right to counsel, access to the courts, meaningful post-conviction review, appellate review, and have subjected petitioner to arbitrary confiscation, destruction or denial of legal documents, exhibits, notes, court records, law books, reference material, and several partially prepared petitions for writs of habeas corpus with exhibits, and incoming and outgoing legal letters. Moreover the petitioner has been denied a meaningful and timely access to the United States Mail. As a result of the aforesaid, the petitioner has had his constitutional rights either denied or abridged in direct contravention to the First, Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution.

"A convicted felon, although civilly dead (See penal code 2600, 2604) is never-the-less a 'person' entitled to due process of law and protection of the Fourteenth Amendment."

In re Riddle, 22 Cal. Reptr. 472
Ex Parte Hull, 312 U.S. 546
Dowd vs. *Cook*, 340 U.S. 206
McCollum vs. *Mayfield*, 130 Fed. Supp. 112

"Access to the courts is as effectively denied by the preventing the preparation of legal documents as it is by preventing their filing."

Cochran vs. *Kansas*, 316 U.S. 255
Ex Parte Hull, 312 U.S. 546
Bailleaux vs. *Holmes*, 177 F. Supp. 361 (1959)

In re Robinson, 112 Cal. App. 2d 728

"When a right is conferred by law, everything necessary for its protection is also conferred."

People vs. *McGorvey*, 61 C.A. 2d 562 at 577.

"A prisoner duly convicted and incarcerated in a state penitentiary does not thereby suffer the loss of his civil rights, and such a prisoner may invoke provisions of the Civil Rights Act."

Redding vs. *Pate*, 220 F. Supp. 124
Ortega vs. *Ragen*, 216 F.2d 561 (Cert. Denied) 349 US 940

"Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, . . ."

Gideon vs. *Wainwright*, 372 U.S. 355

"The Court is satisfied that adequate access to legal materials can only be achieved through the termination of regulation which distinguishes between the acquisition of legal material and other printed matter."

Bailleaux vs. *Holmes*, 177 F. Supp. 361 (1959)

"The right here sought to be protected is not a property right; it is the right to be heard by the courts. Prison officials may not enforce rules which suppress papers directed to the courts."

Dowd vs. *U.S. ex rel. Cook*, 340 U.S. 206
Ex Parte Hull, 312 U.S. 546

". . . A person is unlawfully restrained of his liberty so as to be entitled to the writ of habeas corpus when, even in custody, he is deprived of some right to which, even in his confinement, he is lawfully entitled under the Constitution or laws, the deprivation thereof served to make his imprisonment more onerous than the law allows, or curtails, to a greater extent than the law permits even in his confinement, his freedom to go when and where he likes."

In re George Robinson, 112 Cal. App. 2d 728

"The situation in the case at bar is unusual in that the petitioner is not claiming he was deprived of any constitutional right during trial or up to an including the judgment of conviction. We think, however, that he correctly claimed his detention became illegal by reason of events subsequent to his conviction."

Graham v. *Squier*, 132 F. 2d 681, 683, (9th Circuit)
Cochran v. *Kansas*, 316 U.S. 255, 62 S. St. 1086

IV

Petitioner has been forced into prolonged litigation, which has severely prejudiced his chances of parole with the Adult Authority and caused him to serve an excessive term of imprisonment as punishment solely because petitioner exercised or attempted to exercise his Federal Civil and Constitutional Rights, and as such is in contravention to the due process and equal protection clauses as secured to all citizens by the Fourteenth Amendment to the United States Constitution.

It is a well known and recognized fact that the California Adult Authority does so punish prisoners who dare to litigate their cases. It is a matter of court record that the respondents habitually make a practice of illegally frustrating, hampering and interfering with petitions and other legal actions filed by prisoners in propria persona. For example see:

In re Robinson, 112 Cal. App. 2d 626
In re Chessman, 44 Cal. 2d 23
In re Rider, 50 Cal. App. 797
In re Malone, 112 Cal. App. 2d 631
In re Byrnes, 26 Cal. 2d 824
In re Riddle, 22 Cal. Reptr. 472
People vs. *Slobodion*, 30 Cal. 2d 362
People vs. *Coyle*, 88 Cal. App. 2d 975
People vs. *Stinchcomb*, 92 Cal. App. 2d 741
People vs. *Stinchcomb*, 102 Cal. App. 2d 626
Ex parte Hull, 312 U.S. 546
McCollum vs. *Mayfield*, 130 Fed. Supp. 112
Cochran vs. *Kansas*, 316 U.S. 255

Bailleaux vs. *Holmes*, 177 F. Supp. 361
Gordon vs. *Farrson*, 77 F. Supp. 477
Harper vs. *Wall*, 85 F. Supp. 783
Dowd vs. *Cook*, 340 U.S. 206
United States vs. *Jones*, 207 F. 2d 785

Each prisoner is made to understand that if he persists in attempting to appeal or otherwise litigate his case he can expect to be punished by the Adult Authority by years being added to his sentence and be subjected to relentless persecution and discrimination from the prison officials while serving his sentence.

In each of the above cited cases the court mindful of the equal protection clause of the Fourteenth Amendment held that such interference and arbitrary actions were illegal, however, despite the above decisions, the prison officials and the Adult Authority continue their illegal policy of delaying, hampering, and interfering with the efforts of prisoners seeking to obtain a review of their case by the courts. The prison officials and the Adult Authority have continued their wrongful policy with an expanded scope and increased zeal to oppress, intimidate, and punish any prisoner who dares to enforce or attempts to enforce his Federal Civil and Constitutional Rights. Each official's wrongful act is an intentional and wilful act with each official well aware that his action violates federal criminal statutes, Title 18 U.S.C. sections 241 and 242, and specifically proscribed in Title 42 U.S.C., sections 1983 and 1985.

The rights guaranteed to the petitioner under the State and Federal Constitutions are important to all and any abridgment or impairment of those rights must be carefully scrutinized and complete vindication assured for violations of those fundamental rights as true liberty consists in the privilege of enjoying our own rights, not in the destruction of the rights of others.

V

The overall results of aforesaid deprivations and events set forth in parts I, II, III, and IV, have caused the petitioner to be subjected to cruel and unusual punishment

and have denied him due process and equal protection, privileges, and immunities, in violation of the Eight and Fourteenth Amendments,

The Supreme Court of the United States has repeatedly declared that cruel and unusual punishment, coercion, and the like, may be inflicted upon a person by psychological methods without resorting to the physical tortures.

It is the contention of the petitioner that he has been subjected to cruel and unusual punishment through psychological means, such as, prolonged threats, oppression, coercion, frustration, and a continuous denial of known constitutional rights by means of an unlawful abuse or use of power in violation of the petitioner's human rights.

The United States Supreme Court held in *Robinson* v. *California*, 370 U.S. 660, that cruel and unusual punishment in violation of the Eight Amendment is now enforceable against the States.

Petitioner asserts that upon full evidentiary hearing, wherein he will be assured of the right to subpoena of witnesses and records and afforded a full review of the overall aspects and constitutional deprivations in his case, that an obvious cruel and unusual punishment situation will be shown. Moreover, that petitioner has been deprived of numerous fundamental rights secured under the First, Fifth, Sixth, Eight, and Fourteenth Amendments and with each deprivation subsequent to his judgment of conviction.

This Court has jurisdiction to discharge the petitioner from custody "when the imprisonment was at first lawful, yet by some act, omission, or event which has taken place afterwards, the party has become entitled to a discharge." (California Penal Code, Section 1485 (2).

WHEREFORE, petitioner prays that he be afforded a full evidentiary hearing in the matter presently before the Court and upon adjudication of the issues that petitioner be discharged from custody.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Petitioner in propria persona

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN LUIS OBISPO)

ROBERT NEWTON GARDNER, JR., the petitioner, being under penalty of perjury, states that on the date set forth below he caused to be mailed or served in person a true and correct copy of the present petition for writ of habeas corpus consisting of Twenty Six (26) pages, plus four (4) pages of Index of Exhibits, each annexed hereto and made a part hereof, to the following persons:

James W. Powell
District Attorney
Court House Annex
San Luis Obispo, Cal.

Office of Attorney General
600 State Building
Civic Center
Los Angeles, California

H. V. Field (Respondent)
California Mens Colony
East Facility
Los Padres, California

Mr. A. E. Mallagh
County Clerk
Superior Court (Annex)
Los Padres, California

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.

I, the undersigned, say:

I am the petitioner in this action; the above document is true of my own knowledge, except as to matters that are stated in it on my information and belief, and as to those matters I believe it to be true.

EXECUTED on October 30, 1966, at Los Padres, California. I declare under penalty of perjury that the foregoing is true and correct.

Sincerely,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Affiant and petitioner

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

Case No. ———

In the Matter of the Application of
ROBERT NEWTON GARDNER, JR.
For a Writ of Habeas Corpus

NUMERICAL INDEX TO FOUR GROUPS OF EXHIBITS

GROUP I

No. 1 Letter from Keating, June 3, 1964, denying communication to ACLU Attorney, Marshall Krause, San Francisco, Calif.

No. 2 Letter from Krause, ACLU, to Keating, August 12, 1964.

No. 3 Letter from Krause, ACLU, to Gardner, August 12, 1964.

No. 4 Letter from Keating to Krause, ACLU, August 14, 1964.

No. 5 Letter to Collins, ACLU, August 16, 1964, from Gardner.

No. 6 Letter to Krause, ACLU, August 16, 1964, from Gardner.

No. 7 Letter to Krause, ACLU, August 18, 1964, from Keating.

No. 8 Letter to Krause, ACLU, December 2, 1964, from Gardner.

No. 9 Letter to Krause, ACLU, February 16, 1965, from Gardner.

No. 10 Letter to Gov. Edmund Brown w/copies, Oct. 9, 1966,".

No. 11 Letter to H.V. Field, Supt., Oct. 2, 1966, from Gardner.

No. 12 Letter from Gardner to Supt. CMF re property denied.

No. 13 Letter to Krause, ACLU, as to confiscation of property, dated September 18, 1966.

No. 14 Letter to S.L.O. Co. Super. Ct. as to Mandamus re fee.

No. 15 Letter to trial court as to records denied with reply, dated April 16, 1964.

No. 16 Letter from Pub. Def. showing *Linkletter* effect due to delay. 6-23-65.

No. 17 Letter to Orman, Dep. Pub. Def., 12-15-64, requesting investigation and presentation of claims of perjury during in absentia hearing on coram nobis.

No. 18 Letter from Orman, 12-15-64 as to no such address as given for so-called informer.

No. 19 Letter to court as to Motion to Vacate, May 13, 1964.

No. 20 Letter to USDC as to denial of Fed. Writ Forms, 10-13-66.

No. 21 Letter to US Marshal USDC CD Cal. as to 3rd letter re service of defendants in Civil Rights Suit, 10-13-66.

No. 22 Letter to USDC as to severeal letters sent but not mailed or not answered re Civil Rights Case, 10-1-66.

No. 23 Letter to USDC, Judge Leon Yankwich, as to confiscation of all legal material, during proceedings of 66-1334-Y.

No. 24 Letter to S.L.O. Super. Ct. re Mandamus 5101, 9-29-66.

No. 25 Letter to R.R. Lucas, September 17, 1966, re information as to justification for confication of all legal material.

No. 26 Letter from Court Clerk dated March 25, 1965, showing a Motion to Vacate, filed December, 1964, had been lost.

No. 27 Letter from County Clerk dated August 4, 1964, showing that two pages of documents mailed to petitioner had been removed. Records Officer of Prison later refused to return and admitted possession thereof.

No. 28 Letter to Krause, ACLU, June 13, 1966, as to continuous denial of privlleged communication with counsel.

No. 29 Letter from ACLU San Francisco Office to N.Y. Office as to their stand on petitioners letter of 28. The answer was denied petitioner and returned to sender. June 15, 66.

GROUP II OF EXHIBITS

No. 1 Letter of April 1, 1964, to trial court re records, etc. with note of Lt. Boling denying petitioner right to mail.

No. 2 Letter of April 1, 1964, to Chief Postal Inspector, Washington, D.C., with complaint as to legal mail, both incoming and outgoing, being denied by prison officials.

No. 3 Letter to U.S. Attorney General's Office S.D. of Calif., April 1, 1964, complaining as to denial of legal mail and misuse of veteran's disability funds. Letter denied mailing by La March Lieutenant Boling, G.M.F., Vacaville.

No. 4 Letter of inquiry as to 5 pounds of legal documents, notes, transcripts and books as to case mailed to co-defendant in Colorado. Postage for certified, registered w return receipt requested, was paid by petitioner. Mail Officer in Colorado answered that no such package ever received. Petitioner denied further inquiry.

No. 5 Letter from C. Hull, Prison Records Officer, showing the letters of inquiry were denied, however, Hull claimed the package of legal documents were mailed, Feb. 8, 1965.

No. 6 Request for correspondence with co-defendant re case was denied by Lt. Oliver. March 4, 1965.

No. 7 Request to purchase subscription to Law Review, denied.

No. 8 Request to purchase U.S. Supreme Court Slip Opinions, denied. September 24, 1963.

No. 9 Letter to US Supreme Court re photographic copies of the original certiorari in Griffin vs. California, June 4, 65.

No. 10 Letter from State Supreme Court answering inquiry as to purchase of original habeas corpus of Monroe Hall. 6-23-65.

No. 11 Letter sending check for Monroe Hall petition. 6-28-65.

No. 12 Letter from USDC advising receipt of check in purchase of portions of transcript in US vs. Cooney, Colo., 6-26-64.

GROUP II OF EXHIBITS (Continued)

No. 13 Letter from State Procurement Office showing purchase of 3-ring binders and rules of court. Feb. 26, 1965.

No. 14 Letter of March 12, 1964, from CMF Business Manager showing policy of a 100% penalty for purchasing legal items.

No. 15 Letter of March 21, 1964 after ACLU intervention, to US superintendent of Documents as to purchase of Slip Opinions showing in excess of 50 day delay in mailing by Lt. Oliver.

No. 16 Copy of Dunbar's TRANSMITTAL LETTER as to confiscation and destruction of law books, and the like. Sept. 19, 1966.

No. 17 Letter to USDC, Penn., July 20, 1966, w/check for photocopy of original complaint in Washington v. Ct. Reporter.

No. 18 Letter of USDC, Penn., showing mailing of document in 17.

No. 19 Receipt of document listed in No. 17 and 18.

No. 20 Receipt of purchase of Cal. 2d, Volumes 61, 62 and 63.

No. 21 Receipt for portions of transcript in U.S. v. Cooney.

No. 22 Receipt for institution purchase of ditto-master (CMF).

No. 23 Receipt for subscription payment to B.N.A. Law Week.

No. 24 Receipt for Cal. 2d purchases.

No. 25 Receipt for photographic copies of Munro v. Younger.

No. 26 Letter showing subscription to Preliminary Prints of US Supreme Court, Oct. Terms 1964 and 1965, March 26, 1966.

No. 27 Letter to Clerk Wilson, U.S. 9th Circuit Court of Appeals, showing authorization for having full transcript of the Robichaud vs. Ronan case: February 28, 1966.

No. 28 Letter showing check mailed for purchase of copy of the original complaint in Munro v. Younger, USDC SD of Cal.

No. 29 Letter showing delay in delivery of No. 28, May 10, 1966.

No. 30 Letter of original request in No. 28, March 2, 1966.
No. 31 Letter to US Supreme Court w/check for copy of original complaint in Renaldi v. Yeager, July 20, 1966.
No. 32 Letter to US Supreme Court w/check for Griffin copies and Linkletter, slip-opinions, etc. June 24, 1965.
No. 33 Letter ordering B.N.A. text of Briefing and Arguing Federal Appeals, by B. Wiener, July 17, 1966.
No. 34 Denial of purchase request for Harv. Law Rev. and Softbound booklet on rules of US Supreme Court, Oct. 17, 1963.

GROUP III OF EXHIBITS

No. 1 Order of July 22, 1960, GRANTING transcripts in C-10451, Superior Court, County of Orange, California.
No. 2 Order of July 2, 1963, DENYING transcripts in C-10451, Superior Court, County of Orange, California.
No. 3 REGISTER OF ACTIONS, C-10451, Superior Court, Orange Co.
No. 4 Civil Rights Suit for damages against Orange County Clerk, USDC SD of Cal., case No. 66-1334-Y, pending.
No. 5 Copy of Habeas Corpus No. 4319, Solano County, as to denial of constitutional rights by officials of prison, etc., w/Order denying writ, November 8, 1963.
No. 6 Civil Rights Suit, Gardner v. Madden, 64-1774-JWC USDC SD Cal. with US 9th Circuit Court of Appeals Order Remanding.
No. 7 Slip Opinion, No. 19,971, as to No. 6, Gardner v. Madden, U.S. 9th Circuit Court of Appeals, Remanding to USDC.

GROUP IV OF EXHIBITS

Exhibit "A" Opening Brief, District Court of Appeal, 4/Crim 2153.
Exhibit "B" Respondent's Brief in D.C.A. 4/Crim. 2153.

Exhibit "C" Appellant's Reply Brief in D.C.A. 4/Crim. 2153.
Exhibit "D" Oral arguments in DCA 4/Crim. 2153, Oct. 14, 1965.
Exhibit "E" Opinion of D.C.A. and Order affirming.
Exhibit "F" Petition for Rehearing and Order of DCA Denying.
Exhibit "G" Motion for Continuance, State Supreme Court, 4/cr. 2153.
Exhibit "H" Letters as to continuance, State Supreme Court".
Exhibit "I" Petition for Hearing, State Supreme Court, 4/Crim 2153.
Exhibit "J" Order extending time to file petition for writ of Certiorari to and including May 10, 1966. Order issued by Justice William O. Douglas.
Certification

NOTE AS TO EXHIBITS

The petitioner states that the above listed exhibits are less than half of what he originally had in his possession. All his records related to instant petition, such as letters and receipts, and the like, between the years 1960 and 1963, inclusive, with a a very limited exception, have been confiscated, destroyed, or otherwise denied petitioner by prison officials.

Due to the above situation, petitioner respectfully requests leave to hand carry the above exhibits to the Court and not be required to process them through the prison officials. Moreover, due to the fact that many of the exhibits are original and not replaceable to petitioner, it is requested that continguent to summary denial or upon denial after hearing that petitioner be returned his Four Groups of Exhibits.

Respectfully submitted,

/s/ Robert Newton Gardner, Jr.
ROBERT NEWTON GARDNER, JR.
Petitioner in propria persona

[SEAL]

JAMES W. POWELL
District Attorney
San Luis Obispo County
Courthouse Annex
San Luis Obispo, California
Telephone: 543-1550

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

No. 5101

Endorsed, Filed, Dec. 6, 1966, A. E. Mallagh, County Clerk, By [Illegible], Deputy Clerk.

In the Matter of the Application of
ROBERT NEWTON GARDNER, JR.
For a Writ of Habeas Corpus

ORDER TO SHOW CAUSE RE PETITION FOR WRIT OF HABEAS CORPUS AND ORDER FOR PRODUCTION OF PRISONER

TO: H. V. Field, Superintendent, California Men's Colony, Los Padres, California.

YOU ARE HEREBY ORDERED TO APPEAR before the above-entitled Court, in Department H thereof, in the Courthouse Annex in the City of San Luis Obispo, California, at the hour of 9:30 A.M. on the 20th day of December, 1966, then and there to show legal cause, if any you have, why the petition of ROBERT NEWTON GARDNER, Jr. for issuance of a Writ of Habeas Corpus should not be granted.

IT IS FURTHER ORDERED that you produce at such hearing all records in your custody or under your control that pertain to said Petitioner's commitment to the Department of Corrections of the State of California and/or the California Men's Colony, Los Padres, California.

IT IS FURTHER ORDERED that you produce said Petitioner on said date at the aforesaid time and place to act as a witness in connection with his application for a Writ of Habeas Corpus.

YOU ARE FURTHER COMMANDED to deliver said Petitioner into the custody of the Bailiff of this Court, Department II thereof, on the 20th day of December 1966, at the hour of 9:30 A.M., and any further proceedings.

Dated this 6th day of December, 1966.

/s/ Timothy I. O'Reilly
Judge of the Superior Court

[SEAL]

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED.
AUG 16 1968
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 73

ROBERT NEWTON GARDNER, JR.,

v.

THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONER

CHARLES E. RICKERSHAUSER, JR.
606 South Hill Street
Eleventh Floor
Los Angeles, California
Attorney for Petitioner

INDEX

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Question Presented	5
Statement of the Case	5
Summary of Argument	9
Argument	10
I. Refusal to Provide an Indigent Prisoner With a Free Copy of the Transcript of His Habeas Corpus Hearing Constitutes a Denial of Due Process and Equal Protection of Law	10
A. Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, an Indigent Criminal Defendant or Prisoner Cannot Be Barred From the Tools Necessary to the Meaningful Pursuit of State Remedies	10
B. The Use of a Transcript of a California Superior Court Habeas Corpus Hearing Is Essential to the Pursuit of Further Habeas Corpus Remedies Provided by Law	13
C. Denial of a Transcript in This Context Constituted a Denial of Due Process and Equal Protection of Law	17

Page

II. Refusal to Provide an Indigent Prisoner With a Free Copy of the Transcript of His State Habeas Corpus Hearing Unduly Impairs the Effectiveness of the Federal Habeas Corpus Remedy 19

Conclusion 23

CITATIONS

CASES:

Anders v. *California*, 386 U.S. 738 20

Brown v. *Allen*, 344 U.S. 443 20
Burns v. *Ohio*, 360 U.S. 252 ..... 10, 18

Douglas v. *California*, 372 U.S. 353 ..... 10, 18
Draper v. *Washington*, 372 U.S. 487 ..... 10, 16, 18

Eskridge v. *Washington State Board of Prison Terms & Paroles*, 357 U.S. 214 10

Fay v. *Noia*, 372 U.S. 391 ..... 14, 20

Gideon v. *Wainwright*, 372 U.S. 335 10
Griffin v. *Illinois*, 351 U.S. 12 ..... 10, 11, 12, 18

In re Chessman, 44 Cal. 2d 1 14
In re Ferguson, 55 Cal. 2d 663 6

Lane v. *Brown*, 372 U.S. 477 11
Long v. *District Court*, 385 U.S. 192 ..... 11, 12

People v. *Del Campo*, 174 Cal. App. 2d 217 12
People v. *Ryan*, 118 Cal. App. 2d 144 ..... 12, 14-15

Smith v. *Bennett*, 365 U.S. 708 10

Townsend v. *Sain*, 372 U.S. 293 ..... 14, 20

CONSTITUTIONAL PROVISIONS:

Constitution of the United States, Fourteenth Amendment, Section 1 ..... 2, 8, 10

Page

Constitution of the State of California, Article 6, Section 10 ..... 2, 13

STATUTES:

28 U.S.C. Sections 1257 and 2101 1
28 U.S.C. Section 2254 ..... 19, 21
California Penal Code, Section 1473 ..... 2, 13, 14
California Penal Code, Section 1506 ..... 4, 13, 14
California Appellate Rules, Rule 60 15

MISCELLANEOUS:

Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 Yale L.J. 895 (1966) 20

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 73

ROBERT NEWTON GARDNER, JR.,

v.

THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONER

Opinion Below

The Supreme Court of the State of California did not render an opinion in this matter.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §§1257 and 2101. The Supreme Court of the State of California denied a hearing on May 10, 1967, and the petition for a Writ of Certiorari was filed on June 3, 1967.

Constitutional and Statutory Provisions Involved

Fourteenth Amendment, Section 1, *Constitution of the United States*:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 6, Section 10, *Constitution of the State of California*:

> The Supreme Court, courts of appeal, superior courts and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.
>
> Superior courts have original jurisdiction in all causes except those given by statute to other trial courts.
>
> The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.

Section 1475, *California Penal Code*:

> The writ of habeas corpus may be granted in the manner provided by law. If the writ has been granted by any court or a judge thereof and after the hearing

thereof the prisoner has been remanded, he shall not be discharged from custody by the same or by any other court of like general jurisdiction, or by a judge of the same or any other court of like general jurisdiction, unless upon some ground not existing in fact at the issuing of the prior writ. Should the prisoner desire to urge some point of law not raised in the petition for or at the hearing upon the return of the prior writ, then, in case such prior writ had been returned or returnable before a superior court or a judge thereof, no writ can be issued upon a second or other application except by the appropriate court of appeal or some judge thereof, or by the Supreme Court or some judge thereof, and in such an event such writ must not be made returnable before any superior court or any judge thereof. In the event, however, that the prior writ was returned or made returnable before a court of appeal or any judge thereof, no writ can be issued upon a second or other application except by the Supreme Court or some judge thereof, and such writ must be made returnable before said Supreme Court or some judge thereof.

Every application for a writ of habeas corpus must be verified, and shall state whether any prior application or applications have been made for a writ in regard to the same detention or restraint complained of in the application and if any such prior application or applications have been made the later application must contain a brief statement of all proceedings had therein, or in any of them, to and including the final order or orders made therein, or in any of them, on appeal or otherwise.

* * * * *

Section 1506, *California Penal Code*:

An appeal may be taken to the court of appeal by the people from a final order of a superior court made upon the return of a writ of habeas corpus discharging a defendant or otherwise granting all or any part of the relief sought, in all criminal cases, excepting criminal cases where judgment of death has been rendered, and in such cases to the Supreme Court; and in all criminal cases where an application for a writ of habeas corpus has been heard and determined in a court of appeal, either the defendant or the people may apply for a hearing in the Supreme Court. Such appeal shall be taken and such application for hearing in the Supreme Court shall be made in accordance with rules to be laid down by the Judicial Council. If the people appeal, or petition for hearing in either the court of appeal or the Supreme Court, the defendant shall not be discharged from custody pending final decision upon the appeal or petition for hearing and he must, in any case in which a judgment of conviction has become final, be retaken into custody if he has been discharged; provided, however, that in bailable cases the defendant may be admitted to bail, in the discretion of the judge, pending decision of the appeal or petition for hearing. If the order grants relief other than a discharge from custody, the trial court or the court in which the appeal or petition for hearing is pending may, upon application by the people, in its discretion and upon such conditions as it deems just stay the execution of the order pending final determination of the matter.

Question Presented

Whether the State of California may refuse to provide an indigent prisoner with a free transcript of a hearing of his habeas corpus proceeding for use in pursuing his remedies in the appellate courts of California and, if unsuccessful there, thereafter in the federal courts.

Statement of the Case

Petitioner is a California state prisoner serving an indeterminate sentence, with a maximum term of ten years, based upon a 1960 narcotics offense conviction.

On September 23, 1966 petitioner filed with the Superior Court for the County of San Luis Obispo a document which he styled a Petition for Writ of Mandate or Injunction.

Petitioner claimed that his rights to prepare, file and serve writs and other actions, and his right to have meaningful access to the Courts for determination of his claims, were being infringed by penal institution authorities.[1] Several weeks later petitioner also filed with the same court a petition for habeas corpus alleging essentially the same matters.

The superior court initially entered an order refusing to file the Petition for Writ of Mandate or Injunction, but on motion by petitioner that order was vacated and a fact finding hearing was set for the two actions, which were

---

[1] Petitioner has consistently maintained that the authorities have delayed his mail, have denied him access to his own law books, legal papers, and writing tools, have transferred him frequently from facility to facility resulting in a loss of certain of the same materials, and have confiscated articles, advance sheets, and letters to and from various courts.

consolidated. It also ruled that both actions should be treated as requests for habeas corpus relief.[2] The Public Defender's office was appointed to represent petitioner and petitioner was allowed to testify at the hearing.

On February 15, 1967, subsequent to the hearing, a Memorandum of Decision was filed, reciting, *inter alia*, as follows:

> "The Court having reviewed the evidence and having read the authorities rules as follows:
>
> "That the Petitions be denied and the Writs dissolved. The Court specifically finds that:
>
> "1. There was no invasion of the constitutional rights of the petitioner;
>
> "2. That there occurred no impediment to his access to the courts;
>
> "3. That he had reasonable access to the courts and reasonable access to law books and other legal materials sufficient to meet the requirements of the law."

Thereafter, petitioner filed a motion for a free stenographic transcript of the evidentiary hearing, alleging his impoverished condition (which allegation has never been disputed) and his need for the transcript "as reference in the aid of the preparation for a Writ of *Certiorari* or *Habeas Corpus* which he is desirous of filing with the Clerk of the Supreme Court of the State of California."[3] A brief, prepared by petitioner without the assistance of counsel,

---

[2] Habeas corpus is an appropriate remedy in California for denials of the fundamental rights of a person held in custody. See *In re Ferguson*, 55 Cal. 2d 663, 361 P. 2d 417 (1961).

[3] "Motion Under In Forma Pauperis Provision for Free Transcript of All Proceedings Had Herein," attached to "Notice of Motion" being printed by the Court as part of the Record in this case.

was also filed. The brief elaborated upon petitioner's need for a transcript and contained citations to authorities deemed applicable by petitioner. On March 1, 1967, without prior opportunity for oral argument, the motion was denied by the following order:

> "Petitioner seeks a copy of the transcript of proceedings had before Honorable Timothy I. O'Reilly. These are sought as 'evidence to be contained in the record for review in the Supreme Court of the State of California by avenue of Certiorari or Habeas Corpus.'
>
> "The petitioner may present all matters which were involved in his hearing before Judge O'Reilly by filing a new petition for Writ of Habeas Corpus before a Court having jurisdiction of his matter (including but not limited to the California Supreme Court). His request for relief by such a Court will not be affected by the action of Judge O'Reilly and aside from a statement in his petition that he has sought relief in this Court, with the date thereof, none of the proceedings here will be of concern to the Court before whom the new petition is presented. If that Court for some reason of its own wants a copy of the record, it can order one prepared.
>
> "There is no appeal from a denial of a petition for Writ of Habeas Corpus.
>
> "The petition is DENIED."

Petitioner sought review of the denial of a free transcript by filing a petition for a writ of certiorari in the California District Court of Appeal, Second Appellate District.[4] It was denied, as was a timely petition for a hearing

---

[4] By amendment to the California Constitution, adopted in 1967, the name of the intermediate appellate courts in California was changed from "district court of appeal" to "court of appeal."

in the California Supreme Court. The latter denial was dated May 10, 1967. The petition for a writ of certiorari seeking review of that ruling was filed in this Court on June 3, 1967, and certiorari was granted May 6, 1968. The undersigned counsel was appointed to represent petitioner pursuant to an order entered May 20, 1968.[*]

Summary of Argument

Decisions of this court have established that the due process and equal protection clauses of the Fourteenth Amendment require that when the states provide an appellate procedure for direct or collateral attack upon criminal convictions or imprisonment, meaningful access to that procedure cannot be denied to indigents. Consequently, it has been held, if a transcript of a hearing is necessary to make the full utilization of such appellate procedure meaningful, the indigent defendant or prisoner must be provided with a transcript, or a reasonable alternative, free of charge.

California has adopted a constitutional and statutory procedure for habeas corpus. It is open at three basic levels of the state judicial system—the trial court, the intermediate appellate court, and the state supreme court. Although no appeal in the traditional sense may be taken from a denial of habeas corpus relief by a trial court under California law, original petitions for relief may be presented in the California appellate courts following such denial and federal habeas corpus relief is precluded in the interim period. A transcript of whatever hearing has been held at the trial court level is essential to the effective pres-

[*] Two other petitions for certiorari, seeking review of decisions denying petitioner relief on the merits of his underlying substantive claims, are presently pending. They were filed as Nos. 894 Misc. and 1001 Misc., October Term 1967.

entation of such original petitions in the appellate courts, particularly when as in this case the merits of the substantive claim turn upon complex issues of fact and involve serious policy considerations. Therefore, by denying petitioner, an indigent prisoner, a free transcript of his trial court evidentiary hearing, the California courts have severely disabled him from presenting his claims in the state appellate courts and have denied him due process and equal protection of law.

This case also concerns the problem of accommodating federal and state post-conviction remedies. The existence of such dual channels of relief, and the principles of exhaustion of state remedies which have developed limiting the jurisdiction of Federal District Courts inherently present serious problems of fairness to a state prisoner and to the proper administration of federal and state justice. When a state denies an indigent prisoner a transcript of a post-conviction hearing, it not only hinders him in his subsequent state court proceedings, but also reduces his ability to proceed ultimately in a Federal District Court and places an unnecessary burden on the administration of federal justice.

ARGUMENT

I.

Refusal to Provide an Indigent Prisoner With a Free Copy of the Transcript of His Habeas Corpus Hearing Constitutes a Denial of Due Process and Equal Protection of Law.

A. Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, an Indigent Criminal Defendant or Prisoner Cannot Be Barred From the Tools Necessary to the Meaningful Pursuit of State Remedies.

Under the applicable decisions of this Court, it is firmly established that a state may not, consistent with due process and equal protection of law, deny an indigent criminal defendant or prisoner access to the tools essential for the presentation of his defense and appeal and the pursuit of collateral remedies provided by law. Thus, the indigent may not be denied the assistance of a lawyer at his trial[6] or on direct appeal from conviction.[7] Nor may he be precluded from appealing a conviction or a denial of collateral relief solely because of his inability to pay a docket fee or similar charge.[8] And, he must be provided with a free transcript of trial proceedings in order to aid him in preparing his appeal from conviction.[9] As the Court stated

---

[6] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

[7] *Douglas* v. *California*, 372 U.S. 353 (1963).

[8] *Smith* v. *Bennett*, 365 U.S. 708 (1961); *Burns* v. *Ohio*, 360 U.S. 252 (1959).

[9] *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Eskridge* v. *Washington State Board of Prison Terms & Paroles*, 357 U.S. 214 (1958); *Draper* v. *Washington*, 372 U.S. 487 (1963).

in *Griffin* v. *Illinois*, 351 U.S. 12, at 17-18 (1956), wherein the last-mentioned right was established:

> "Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be an excuse to deprive a defendant of a fair trial.
>
> • • • • •
>
> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, *e.g.*, McKane v. Durston, 153 U.S. 684. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."

The basic principle of *Griffin* is also applicable in the context of collateral proceedings such as habeas corpus if the use of a transcript of the proceedings by a petitioner is essential either because of a requirement of state law governing the perfecting of appeals[10] or because it is necessary to the effective preparation and presentation of an appeal:[11]

> "We specifically held in Smith that having established a post-conviction procedure, a State cannot condition its availability to an indigent upon any financial con-

---

[10] *Lane* v. *Brown*, 372 U.S. 477 (1963).

[11] *Long* v. *District Court*, 385 U.S. 192 (1966).

sideration. And we held in Lane that the same rule applied to protect an indigent against a financial obstacle to the exercise of a state-vested right to appeal from an adverse decision in a post-conviction proceeding.

* * * * *

"The State suggests that there may be alternative ways of preparing for purposes of appeal, on account of the relevant proceeding at the trial level. Cf. Draper v. Washington, supra. In the present case, a transcript is available and could easily have been furnished. We need not consider a possible situation where a transcript cannot reasonably be made available and adequate alternatives are made available by the State." *Long* v. *District Court*, 385 U.S. at 194-95.

The present case appears to fall directly within the principles of *Griffin* and *Long* and the related precedents discussed above. The only possible contention that it does not would have to be based upon one peculiar facet of California habeas corpus procedure. Specifically, the only factor differentiating this case is that in California a habeas corpus petitioner is not entitled to appeal, in the traditional sense, from a denial of relief by a superior court. See *People* v. *Del Campo*, 174 Cal. App. 2d 217, 344 P.2d 339 (1959); *People* v. *Ryan*, 118 Cal. App. 2d 144, 257 P.2d 474 (1953). It is this narrow difference, and the statement in *Griffin* as to the availability there of a right of appeal, that can provide the only possible justification for the denial of this petitioner's motion for a free transcript. But an examination of the California habeas corpus procedure in the context of this case discloses that the basic considerations underlying the *Griffin* and *Long* decisions are present here.

B. The Use of a Transcript of a California Superior Court Habeas Corpus Hearing Is Essential to the Pursuit of Further Habeas Corpus Remedies Provided by Law.

Under the applicable California constitutional provisions and statutes specifying the jurisdictional requisites for the writ of habeas corpus, petitioner was initially entitled to proceed in a superior court, or in a court of appeal, or in the California Supreme Court.[12] Petitioner elected to commence in the superior court and filed there his several petitions. Had he instead chosen to proceed first in the court of appeal, he would clearly have been entitled to petition the California Supreme Court for a hearing following a denial[13] and would thus have been within the precedents of this Court requiring the provision of a free transcript.

In preparing his petitions to the superior court petitioner was not entitled to a court-appointed lawyer and he did not in fact have the assistance of counsel due to his impoverished condition. Not until the superior court judge determined that the application for relief on its face had sufficient merit to justify a hearing was petitioner given the assistance of counsel, and then for purposes of the evidentiary hearing only. When the superior court ultimately denied relief and discharged the writ, counsel was discharged and petitioner was left to his own devices in pursuing further avenues of relief.

At this point, petitioner's choice of state forums was narrowed to the state court of appeal or the state supreme

---

[12] *California Constitution*, Article 6, §10; *California Penal Code* §1475.

[13] *California Penal Code* §1506.

court.[14] He was not yet entitled to proceed directly to a Federal District Court for habeas corpus relief since, even under the liberalized "exhaustion" principles established in *Fay* v. *Noia*, 372 U.S. 391 (1963) and *Townsend* v. *Sain*, 372 U.S. 293 (1963), he still had avenues of state court relief open to him.

In drafting his original petitions for habeas corpus to the state appellate courts, petitioner, again unassisted by counsel,[15] was required by statute to state that he had applied for relief in superior court, that a hearing had been held, and that the superior court had rejected his contentions.[16] Again the petitioned court had discretion to grant or deny an evidentiary hearing after examining the facts alleged by petitioner and the issues presented. In exercising this discretion—in deciding whether to grant or deny a further hearing—the petitioned court would likely have used the transcript of the hearing in the lower court had it been available. Any prisoner with funds would obviously have made such a transcript available to the court.

Indeed, if the superior court had granted petitioner relief in the habeas corpus proceeding, the Attorney General would have been entitled to an appeal in the customary sense of that term, and petitioner would not have been discharged unless and until the appellate court affirmed the decision granting relief. *California Penal Code* §1506; *In re Chessman*, 44 Cal. 2d 1, 279 P.2d 24 (1955); *People*

---

[14] Under §1475 of the *California Penal Code*, no further petitions for habeas corpus relief concerning the same subject matter and the same petitioner could be considered by any superior court in the state.

[15] As stated above, counsel was discharged upon the denial of relief by the superior court.

[16] *California Penal Code* §1475.

v. *Ryan*, 118 Cal. App. 2d 144, 257 P.2d 474 (1953). The Attorney General would have acquired a stenographic transcript to assist him in prosecuting such an appeal and the appellate court would have had authority to order the transcript included as part of the record.[17]

In the context of the above-described procedure, the importance to the applicant for habeas corpus relief of a transcript of any evidentiary hearing held while he pursues his state remedies is demonstrated with particular force by the nature of the substantive claims which this present petitioner has sought to establish. His allegations basically concern repeated harassment by California prison authorities resulting in a denial of his free access to the courts. Such claims are inherently complex. They involve the accommodation of reasonable confinement rules with the fundamental rights of those who are confined.

The complexity of the issues of law raised by such claims is mirrored by the complexity of the factual picture presented by this petitioner's allegations. Clearly his case for relief was not such that a court could summarily conclude that he had been denied all access to the courts and thus that relief should be immediately granted. Such a summary conclusion would have been difficult to square with the fact that petitioner was able to file numerous petitions and was granted an order to show cause by a superior court resulting in an evidentiary hearing at which he testified. Nor, however, were petitioner's claims such that, even if the alleged facts were true, no court could as a matter of law grant him relief. Indeed, the superior court in this case concluded at the outset that enough had been alleged to warrant the issuance of an order to show cause.

---

[17] *California Appellate Rules*, Rule 60.

In short, then, petitioner's quest for habeas corpus relief in the state courts raised the kinds of factual and legal issues which could be decided only after a careful scrutiny of the facts and weighing of the relevant policies.

Obviously, in preparing petitions for relief in a case of this nature, it is essential for a prisoner to have the use of a transcript of the record of any hearing at which the facts were explored, particularly when he does not have the assistance of counsel at any stage, except the hearing itself. Absent such a transcript, the petitioner, as here, is left to his own lay memory of what was proved, disproved, admitted or denied. Consequently, his petitions may well omit pertinent facts established on the only occasion during which he had the assistance of a lawyer in airing his claims. Cf. *Draper* v. *Washington*, 372 U.S. 487, at 493 and 496-97 (1963).[12]

Moreover, even if a petitioner had total recall of what had transpired and were sufficiently trained in law to recognize and develop the strongest legal and factual arguments that could be made based upon the testimony given at the hearing, the inability because of poverty to acquire and cite a transcript in preparing petitions to higher courts would always severely limit any possibility that relief would be granted. Logic compels the conclusion that a reviewing court will give greater weight to a transcript or a petition documented by citations to or quotations from the same than it will to an unsupported allegation as to what transpired below. Cf. *Draper* v. *Washington*, *supra*. This conclusion again is uniquely demonstrated by the nature of this

[12] At the cited pages of *Draper*, the opinion of the Court elaborates upon the unlikelihood that an indigent who does not have access to a transcript can obtain adequate consideration of his claims by an appellate court.

petitioner's underlying claims,[19] for, while it is true that under California law the appellate courts have original habeas corpus jurisdiction and may order their own evidentiary hearings if they determine that a hearing is justified by the allegations, any court would react with considerable skepticism to a petition claiming a denial of access to the courts filed by a prisoner who is able to prepare and file such a petition and who previously was accorded a fact-finding hearing by a lower court. This skepticism can only be overcome by a well-documented petition containing citations to and quotations from the lower court record supporting the conclusion that the lower court wrongly decided the claim. A petition with no such citations or quotations is far less likely to obtain extensive consideration. Thus, when denied access to a transcript, the indigent prisoner is effectively precluded at the threshold of his pursuit of habeas corpus relief in the appellate courts.

C. Denial of a Transcript in This Context Constituted a Denial of Due Process and Equal Protection of Law.

By opening all levels of its courts to habeas corpus claims by state prisoners, California has brought into play the exhaustion principles which govern the jurisdiction of Federal District Courts to grant habeas corpus relief. Obviously, this results in consumption of a substantial amount of time prior to the point at which the state prisoner may proceed to test his case in Federal District Court without the threat of being rejected for not having exhausted a remedy provided by state law. In petitioner's case, the full pursuit of state remedies, along with the petitions for cer-

[19] It would undoubtedly be valid in any instance where a prisoner, unaided by counsel and without the benefit of a transcript to document his case, applies for habeas corpus relief in state appellate courts following a hearing and denial of such relief by a trial court.

tiorari to this Court from the judgments of the state courts, will have absorbed over two years by the time this case is heard in this Court, or more than one-fifth of the maximum term to which petitioner was sentenced. If such a procedure is to be tolerated under the Federal Constitution, it must at all levels provide a meaningful review of claimed infringement of important rights. By denying the indigent prisoner a transcript of the only hearing into his claims, however, California has so diminished the chances that relief will be granted an indigent at the second and third levels of its procedures following a hearing and denial at the first level, that it must be considered fundamentally unfair and thus a denial of due process of law.

A non-indigent prisoner would not suffer the same handicap as the subject petitioner in pursuing habeas corpus relief in the California appellate courts. A non-indigent prisoner could purchase and cite a transcript of any hearing in a superior court involving his case, and thus could more effectively prepare and prosecute his further petitions to the state court of appeal or supreme court. Consequently, in addition to violating the standards of due process, the California rule denying to indigents free transcripts of their habeas corpus proceedings results in an invidious discrimination based solely on the indigent's inability to pay and constitutes a denial of equal protection of law. *Draper* v. *Washington*, 372 U.S. 487 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963); *Burns* v. *Ohio*, 360 U.S. 252 (1959); *Griffin* v. *Illinois*, 351 U.S. 12, at 17-18 (1956). As the Court stated in *Draper*, *supra*, at 496:

> "In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds—the State must provide the indigent defendant with means of presenting

his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions."

That duty of nondiscrimination was not discharged by the State of California in this case.

II.

Refusal to Provide an Indigent Prisoner With a Free Copy of the Transcript of His State Habeas Corpus Hearing Unduly Impairs the Effectiveness of the Federal Habeas Corpus Remedy.

Aside from the state appellate review aspects of this case and the denial of due process and equal protection of the laws in that regard, the questions here presented have what may be an even greater significance insofar as they involve the relationship between state and federal post-conviction procedures for state prisoners. Presumably, after this petitioner has exhausted his post-conviction remedies in all of the state courts to which access is provided (and assuming certiorari is applied for in this Court and denied in each instance involving the merits of petitioner's substantive claims), he may then proceed to seek habeas corpus relief in an appropriate United States District Court. The preparation of his petition and his ability to obtain effective relief in a federal forum will, however, depend upon his ability to satisfy certain criteria established in governing decisions of this Court and the provisions of 28 U.S.C. §2254, as constituted after the 1966 amendments thereto. As will be shown below, the availability of a free transcript of the state court habeas corpus hearing is not only crucial to petitioner's ability to satisfy such criteria, but it is also integral to an accommodation of the federal-state tensions

arising from the existence of dual channels for post-conviction relief. See Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 Yale L.J. 895 (1966).

In such landmark cases as *Brown* v. *Allen*, 344 U.S. 443 (1953), *Fay* v. *Noia*, 372 U.S. 391 (1963), and *Townsend* v. *Sain*, 372 U.S. 293 (1963), this Court has examined in depth the basic question of when an evidentiary hearing should or must be accorded to a state prisoner seeking federal habeas corpus relief. In each instance, central to the Court's reasoning was a concern as to the adequacy of whatever fact-finding proceeding had occurred at the state court level. Thus, it has been held that if the state prisoner could demonstrate that the state court did not reach and decide the issues of fact presented by the prisoner's evidence or that the state court's factual determination was not fairly supported by the state court record, then he would be entitled at the very least to a new hearing in the Federal District Court. See *Townsend* v. *Sain*, *supra*, at 313-14, 315.

But the indigent state prisoner who is not granted access to the transcript of his state court hearing will obviously face great difficulty in making such a showing in his petition to a federal court, and his ability effectively to pursue federal habeas corpus will thereby be lessened at the threshold. If such indigent prisoners are to be placed on any sort of an equal footing with prisoners who can afford to purchase a transcript, the Federal District Court must itself order up the record and scrutinize it carefully, unaided by the guidance of an appointed lawyer or even a fully-informed petitioner. This alternative would place a heavy and unnecessary additional burden on the federal courts in addition to denying the prisoner a fair chance fully to present his petition as an advocate with supporting references to the record. Cf. *Anders* v. *California*, 386 U.S. 738 (1967).

The manifest difficulty that an indigent state prisoner would have in presenting his federal petition under these circumstances is heightened when the present requirements of 28 U.S.C. §2254 are examined. Subparagraph (d) of that section establishes a presumption of correctness where a state court habeas corpus proceeding has resulted in a "written finding, written opinion, or other reliable and adequate written indicia," and casts the burden upon the applicant to establish fundamental error, lack of jurisdiction, or a denial of certain basic rights. Provision is made, in subparagraph (e) of the same section, for production of the record of the state court proceeding by order of the court if the applicant is an indigent and is unable to produce such record. But the record, even then, apparently, is produced only for the court's review and then only if the claim "challenges the sufficiency of the evidence adduced in such state court to support the state court's determination of a factual issue." [20]

The net result when Section 2254 and the California rule denying a transcript of superior court evidentiary hearings are combined is that the indigent California state prisoner who applies for federal habeas corpus has a heavy burden to overcome a presumption of the correctness of the state court decision and establish a prima facie case in the application itself, and yet at that stage he does not have a tran-

---

[20] "(e) *If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein,* the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination." [Emphasis added.]

script and the District Court in which he is proceeding apparently does not have statutory authority to order a transcript prepared and delivered to him. Indeed, unless the challenge is directed to the sufficiency of the evidence to support a state court finding of fact, it would appear that neither the federal court nor the indigent can obtain the transcript unless the state itself comes forward willingly with the same.[21]

The inequities to the indigent and the tension thus created in federal-state relations can be alleviated by the simple measure of requiring as an element of due process or equal protection that the states furnish the transcripts to the affected indigent prisoner whenever an evidentiary hearing is held in a state post-conviction proceeding, whether or not the indigent has a right to appeal within the state appellate court system.[22] So long as it is required that a prisoner exhaust state post-conviction remedies before proceeding to Federal District Court for habeas corpus relief, the indigent prisoner who pursues this time-consuming procedure (including, as here, an evidentiary hearing) should be allowed to make full use of whatever tools are developed in the process that might expedite his search for relief. The state, as well as non-indigent prisoners in California, have access to the state trial court record in presenting their post-conviction petitions and responses at other levels of the judicial system. The same right should be accorded to indigent prisoners.

---

[21] See note 20, *supra*.

[22] If, as the state has contended here, the prisoner has no right of appeal within the state appellate court system, the trial court's denial of relief would be a final judgment of the highest state court having jurisdiction of the matter, thus opening the way to a petition for certiorari directly to this Court. A transcript would be highly useful and perhaps essential to the drafting of the petition, and certainly to a fully-informed review by this Court.

Conclusion

For all of the reasons stated above, the decision below should be reversed and the case remanded with instructions to release the prisoner from custody unless he is provided, within a reasonable time, a free transcript of the habeas corpus hearing held in the Superior Court of the County of San Luis Obispo, State of California.

Respectfully submitted,

CHARLES E. RICKERSHAUSER, JR.
Attorney for Petitioner

August 6, 1968.

LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
SEP 30 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968
No. 73

ROBERT NEWTON GARDNER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Superior Court of the County of San Luis Obispo, State of California

BRIEF FOR RESPONDENT ~~IN OPPOSITION~~

THOMAS C. LYNCH,
Attorney General of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

JACK K. WEBER,
Deputy Attorney General of the State of California,

600 State Building,
217 West First Street,
Los Angeles, Calif. 90012,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	1
Statutes Involved	2
Statement of the Case	2
A. The Petitions in the Superior Court	2
B. The Trial Court's Rulings	3
C. The Motion for Transcripts	4
D. The Attempt to Secure Appellate Action on the Transcripts	6
Summary of Argument	8
Argument	9
Petitioner Should Not Be Entitled to a Transcript of a Habeas Corpus Hearing Without Establishing His Need for It in the Court to Which He Is Presenting His Allegations Since There Is No Appeal Under California Procedure	9
A. California Properly Requires Presentation of Substantive Questions Before Transcripts Will Be Prepared	9
B. California Does Not Condition Access to Appellate Habeas Corpus	12
C. California's Procedures Have Been Sustained in the Federal Courts	13
D. California's Rule About Transcripts Parallels Other Rules	15
E. Petitioners Cannot Properly Reply on Long to Invalidate California Rules	16

Page

F. Any Value to Petitioner in Having Transcripts of the Evidentiary Hearing Before He States His Allegations Is Outweighed by the Economic Waste in Permitting It Without Such a Screening 21

G. The Federal Habeas Corpus Remedy Is Not Impaired by California's Procedures 24

Conclusion 26

Appendix Pertinent Statutes and Rules Involved ..... App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Ali, In re, 230 Cal. App. 2d 585, 41 Cal. Rptr. 108	17
Allison, In re, 66 Cal. 2d 282, 57 Cal. Rptr. 593	24
Benson v. State of California, 328 F. 2d 159	20
Chavez v. Dickson, 280 F. 2d 727	25
Davis, Elmer, Ex Parte, 318 U.S. 412	12
Douglas v. California, 372 U.S. 353	23
Draper v. Washington, 372 U.S. 487	10
Durley v. Mayo, 351 U.S. 277	7
Eskridge v. Rhay, 345 F. 2d 778, cert. den. 382 U.S. 996, 86 S. Ct. 582, 15 L. ed. 2d 483, reh. den. 383 U.S. 922, 86 S. Ct. 903, 15 L. ed. 2d 679	15
Fulks v. Walker, 224 Ark. 639, 275 S.W. 2d 873	17
Gilmore v. Lynch, ... F. 2d ....., Ninth Circuit No. 22052	24
Griffin v. Illinois, 351 U.S. 12	11, 13, 16, 19
Gross v. Superior Court, 42 Cal. 2d 816, 270 P. 2d 1025	7
Hatfield v. Bailleaux, 290 F. 2d 632, cert. den. 368 U.S. 862, 82 S. Ct. 105, 7 L. ed. 2d 59	15
Hillery, In re, 202 Cal. App. 2d 293, 20 Cal. Rptr. 759	20
Howe, In re, 135 Cal. App. 2d 604, 287 P. 2d 510	17
Hughes, Matter of, 159 Cal. 360	22
Ingle v. Fitzharris, 283 F. Supp. 205	20
Jarvis v. United States, 381 F. 2d 712	15
Jones, In re, 260 A.C.A. 957	18

Page

Ketcherside v. United States, 317 F. 2d 807 15
Lane v. Brown, 372 U.S. 477 13
Largent v. Texas, 318 U.S. 418 7
Long v. District Court of Iowa, 385 U.S. 192 ..... 12, 13, 16, 17, 18, 19
Loustalot v. Superior Court, 30 Cal. 2d 905, 186 P. 2d 673 13
McLaren v. Peyton, 262 F. Supp. 120 12
People v. Chavez, 243 Cal. App. 2d 761, 52 Cal. Rptr. 633 9
People v. Gardner, 128 Cal. App. 2d 1, 274 P. 2d 908 2
People v. Hill, 67 Cal. 2d 105, 60 Cal. Rptr. 234 23
People v. Shipman, 62 Cal. 2d 226, 42 Cal. Rptr. 1 15
People v. Smith, 34 Cal. 2d 449, 211 P. 2d 561 9
Perkins, In re, 165 Cal. App. 2d 73, 331 P. 2d 712 18
Peyton v. Rowe, 391 U.S. 54 17
Pike v. Dickson, 323 F. 2d 856 ..... 20, 25
Pruitt, Application of, 119 F. Supp. 737 15
Riddle, In re, 57 Cal. 2d 848, 22 Cal. Rptr. 472 20
Rinaldi v. Yeager, 384 U.S. 305 18
Roberts v. La Vallee, 389 U.S. 40 11
Sanders v. United States, 373 U.S. 1 17
Schlette v. Peo. of State of Calif., 284 F. 2d 827 .. 15
Schoengarth, In re, 66 Cal. 2d 295, 57 Cal. Rptr. 600 24
Smith v. Bennett, 365 U.S. 708 12

Page

Sweet, In re, 113 Cal. App. 2d 413, 248 P. 2d 94 ... 17
Tayler v. U.S., 238 F. 2d 409 ... 15
Tenner v. Dullea, 314 U.S. 692 ... 7
United States v. Glass, 317 F. 2d 200 ... 15
United States v. Myers, 241 F. Supp. 85 ... 15
United States v. Newsome, 257 F. Supp. 201 ... 15
United States v. Shoaf, 341 F. 2d 832 ... 15
United States v. Wiley, 238 F. Supp. 1008 ... 15
Wilson v. Wade, 390 F. 2d 632 ... 13
Wright v. Dickson, 336 F. 2d 878 ... 20

Rule

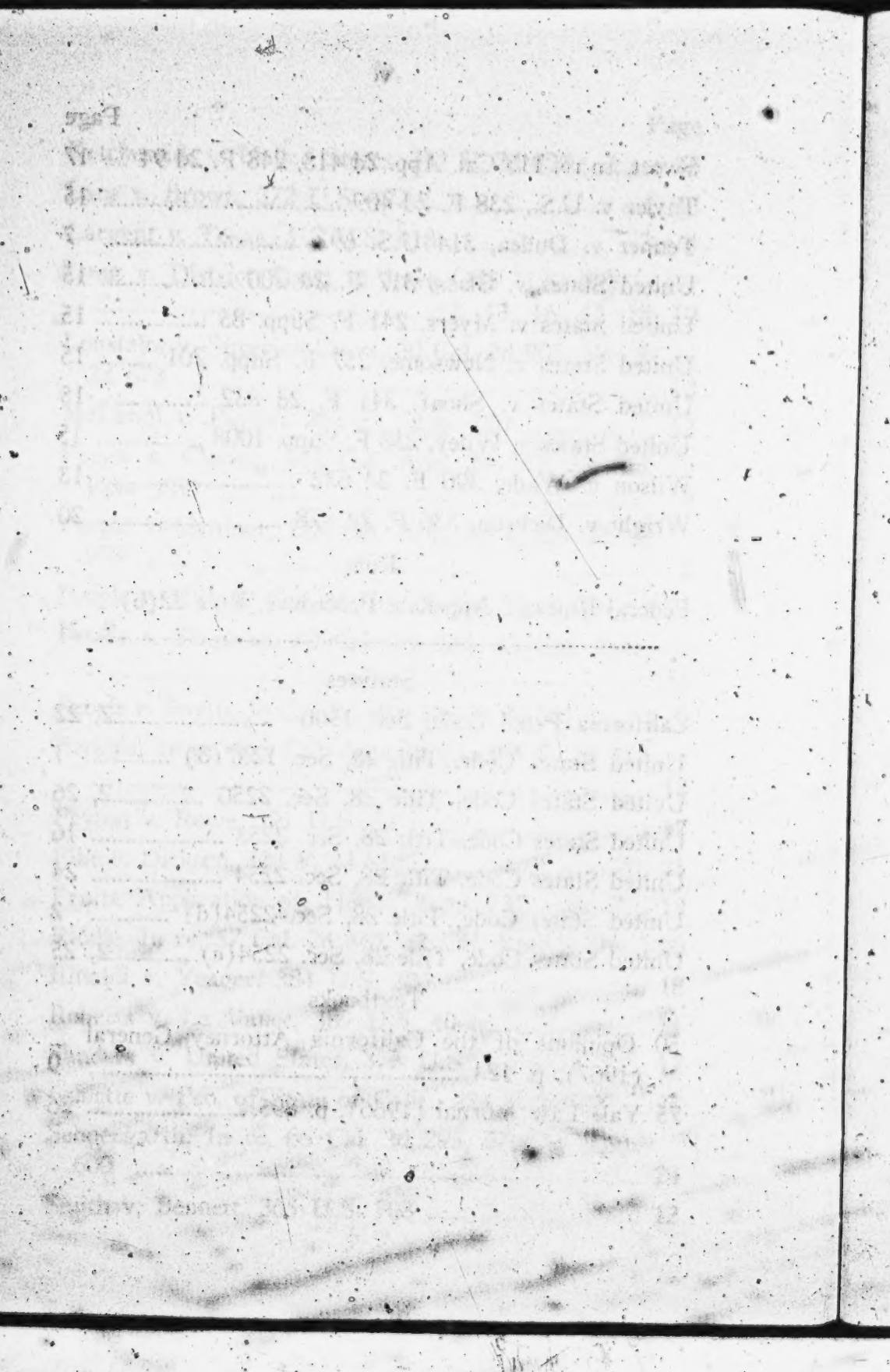
Federal Rules of Appellate Procedure, Rule 22(b) ... 2, 21

Statutes

California Penal Code, Sec. 1506 ... 2, 22
United States Code, Title 28, Sec. 1257(3) ... 1
United States Code, Title 28, Sec. 2250 ... 2, 26
United States Code, Title 28, Sec. 2253 ... 16
United States Code, Title 28, Sec. 2254 ... 24
United States Code, Title 28, Sec. 2254(d) ... 2
United States Code, Title 28, Sec. 2254(e) ... 2, 25

Textbooks

50 Opinions of the California Attorney General (1967), p. 124 ... 9
75 Yale Law Journal (1966), p. 895 ... 26



IN THE

Supreme Court of the United States

October Term, 1968
No. 73

ROBERT NEWTON GARDNER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Superior Court of the County of San Luis Obispo, State of California

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

A brief opinion or order was filed in the Superior Court and is set forth in the record. The petitions to the California Court of Appeal and Supreme Court were denied without opinion.

Jurisdiction

The jurisdiction of this Court would be invoked under 28 U.S.C. §1257(3).

Questions Presented

Since California does not permit an appeal from a denial of habeas corpus, can it properly seek to avoid the unnecessary preparation of transcripts by requiring that an indigent who seeks a free transcript of an evidentiary hearing in a habeas corpus case apply

for the transcript in the court from which he will seek relief with his allegations so that his need for the transcript can be evaluated or whether he is automatically entitled to it on his representation that he wants it for reference in filing future habeas corpus applications?

Statutes Involved

28 U.S.C. §2254(d) and (e);

28 U.S.C. §2250;

Rule 22(b) of the Federal Rules of Appellate Procedure.

Section 1506, California Penal Code.

(These are set forth in the Appendix.)

Statement of the Case

Petitioner is a California state prisoner serving an indeterminate 10-year term for a 1960 narcotics offense and a life term for robbery. See *People v. Gardner*, 128 Cal. App. 2d 1, 274 P. 2d 908.

A. The Petitions in the Superior Court

On September 23, 1966, petitioner filed a petition for writ of mandate or injunction in the San Luis Obispo Superior Court. (A.2.) He alleged that he had accumulated legal-like documents that would show a denial of his constitutional rights, but was transferred without adequate time to prepare or pack his legal records, and all of his legal materials were either misdirected, lost, or otherwise denied to him. (A.4-A.5.)

The petition was at first denied, but petitioner's motion to vacate was granted and the matter was set for hearing. (A.19-A.26.)

On November 16, 1966, petitioner filed a petition for writ of habeas corpus,[1] alleging that because he had not been furnished transcripts he was denied a timely and meaningful coram nobis appeal. He also complained of insufficient access to legal materials and urged that this had hampered his legal efforts. He said that for five weeks after his transfer he was denied all legal materials and that on October 4, 1966 only limited property was afforded him. He said letters he had written at other institutions took up to 67 days for delivery. He said that he had not been permitted to write to a specific lawyer and he had been denied "privileged communication" with court and counsel. Petitioner complained that on September 16, 1966 the Director of Corrections wrote a transmittal letter specifying the law books in each library and the library no longer had the United States Code, the Rules of the Federal District Court, and the Federal Rules on Criminal and Civil Procedure. Personally owned law books were not permitted. As a numerical index to the exhibits, petitioner specified some 80 legal documents in his possession, saying it was less than half what he originally had.

On December 6, 1966, petitioner moved for the appointment of counsel. It was ordered that the public defender be appointed. (A.28-A.30.)

B. The Trial Court's Rulings

By memorandum decision on February 15, 1967, the court determined that the petitions were for habeas corpus, it recited that evidence was taken and points and authorities submitted and it held:

---

[1]By letter dated Sept. 18, 1968 counsel of petitioner has requested the clerk to add this petition to the record.

"1. There was no invasion of the constitutional rights of the petitioner;

2. That there occurred no impediment to his access to the courts;

3. That he had reasonable access to the courts and reasonable access to law books and other legal materials sufficient to meet the requirements of the law." (A.31.)

C. The Motion for Transcripts

On March 1, 1967, petitioner moved for a free transcript of all proceedings. (A.32.) He wanted:

1. All pleadings, motions, memoranda, and affidavits in support thereof as presented by petitioner and respondent;

2. All of respondent's exhibits;

3. The clerk's minutes;

4. The court's decision;

5. The complete record of oral and documentary evidence. (A.33.)

Petitioner said: "Petitioner does not complain of the full hearing accorded him by this Honorable Court. The hearing was full and fair and it is the contention of the petitioner that the evidence adduced at that hearing will substantiate the claims of petitioner." He said the transcript was necessary so he could properly present his claims to the California Supreme Court. He said, "Those transcripts will be necessary to petitioner in the proper preparation of his petition seeking review of the hearing had in the instant case. In

addition, the transcripts will be necessary to prove the petitioner's allegations of constitutional deprivation spelled out during that hearing and to substantiate the allegations and cause of petitioner by the evidence adduced at that hearing." He said that he had a right to establish a prima facie case for the issuance of a writ. (A.36-A.40.)

An order was entered on March 1, 1967, denying the motion. It read as follows:

> "Petitioner seeks a copy of the transcript of proceedings had before Honorable Timothy I. O'Reilly. These are sought as evidence to be contained in the record for review in the Supreme Court of the State of California by avenue of Certiorari or Habeas Corpus.
>
> "The petitioner may present all matters which were involved in his hearing before Judge O'Reilly by filing a new Petition For Writ of Habeas Corpus before a court having jurisdiction of his matter (including but not limited to the California Supreme Court.) His request for relief by such a court will not be affected by the action of Judge O'Reilly and aside from a statement in his petition that he has sought relief in this court, with the date thereof stated, none of the proceedings here will be of concern to the court before whom the new petition is presented. If that court for some reason of its own wants a copy of the record, it can order one prepared.
>
> "There is no appeal from a denial of a petition for Writ of Habeas Corpus." (A.43.)

D. The Attempt to Secure Appellate Action on the Transcripts

Thereafter, on March 14, 1967, petitioner filed a Petition For Writ of Certiorari in the California Court of Appeal. (A.44.) Petitioner alleged that a transcript of the evidentiary hearing "is necessary as an exhibit and as reference to the full hearing had in the matter and essential to petitioner as reference in the aid of the preparation for a petition. . . . Moreover, the transcripts of that hearing is necessary to petitioner so that he may properly present his claims to those courts and to allow those courts to review the entire record adduced thereon so they may properly adjudicate the issues and review the Superior Court's decisions regarding the federal questions presented by the petitioner." (A.47.)

This was denied on March 23, 1967, without opinion. (A.52.)

On or about April 20, 1967, petitioner filed for a hearing in the California Supreme Court. (A.53.) Here he said (at p. 4),

> "The transcripts . . . as an exhibit and as reference to the evidence taken in the matter . . . is essential to petitioner as he desires to present the same matter to an appellate court and the federal courts. Those courts would be interested in the transcript and may not need any additional testimony. Moreover, petitioner needs the transcripts so that he may be able to submit the matter on the of the evidentiary hearing had in the matter. Furthermore, the transcript of that hearing is necessary to the petitioner so so that he may properly present his claims to those courts and to allow those courts to review the entire record and

the evidence adduced therein so they may properly adjudicate the the issues and review the Superior Court's decisions . . ." (A.56-A.57.)

This petition was denied on May 10, 1967.[2] (A.62.) The present petition for certiorari followed.

---

[2]The front page of petitioner's brief indicates that certiorari is directed to this order of the Supreme Court of the State of California. Petitioner's statement as to jurisdiction also alludes to the order of the Supreme Court. The last portion of his statement of the case refers to seeking review of the Supreme Court order. (Pet. Op. Br. pp. 1, 8.) However, he also says, in footnote 22, at page 22 of Petitioner's Opening Brief, while arguing another issue, that the trial court's denial of relief is a final judgment of the highest state court having jurisdiction, thus opening the way for a direct petition for certiorari to this court. (The Petition for Certiorari was filed within 90 days of both the Superior Court and Supreme Court Orders.) The order granting certiorari designates certiorari to the Superior Court. (A. 63.)

The problem of which order we are reviewing has two ramifications: One, petitioner must show some proper avenue to this court, and, two, the record before us may be influenced by the choice of order. (The California Supreme Court would have had before it only the Petition For Hearing and the Petition For Certiorari in the Court of Appeal.)

The Superior Court order is not reviewable because it is not the judgment of the highest state court. *Tenner v. Dullea*, 314 U.S. 692 (1941); *cf. Largent v. Texas*, 318 U.S. 418, 421 (1943). It could not be argued that on habeas corpus or other writs the state appellate courts are powerless to deal with a request for a transcript needed by an indigent. See *Gross v. Superior Court*, 42 Cal. 2d 816, 270 P. 2d 1025.

However, even if certiorari were brought against the Supreme Court order we submit that it would not be proper. Petitioner's attack on the Supreme Court order rests on the assumption that certiorari is a proper method of presenting a claim for transcripts. We have found no case in which it has been so applied in California, and none has been cited.

Since there is nothing to prevent petitioner from following the usual state practice, presenting his substantive allegations and amending his allegations if transcripts are granted, it is also a reasonable state procedure, and an adequate nonfederal ground of decision, severable from any federal ground, to require application to the court in which the claim is to be presented, with a statement of the allegations. The fact that the Supreme Court of the State of California has denied the petition for hearing without opinion does not bar us from inferring that this might have been its reasoning. *Durley v. Mayo*, 351 U.S. 277, 284 (1956).

Summary of Argument

Respondent submits that California's procedure of requiring an indigent petitioner to first present his allegations is open to no federal objection and is sustainable as an adequate nonfederal ground. The possibilities of economic waste inherent in permitting prisoners to become their own judges of what they need in the way of transcripts of evidentiary hearings in habeas corpus cases justifies a screening procedure.

ARGUMENT

Petitioner Should Not Be Entitled to a Transcript of a Habeas Corpus Hearing Without Establishing His Need for It in the Court to Which He Is Presenting His Allegations Since There Is No Appeal Under California Procedure

California furnishes a free transcript to an appealing defendant in a criminal case. It does not condition that right or dilute it once an appeal is taken. *People v. Smith,* 34 Cal. 2d 449, 453, 211 P. 2d 561.

A. California Properly Requires Presentation of Substantive Questions Before Transcripts Will Be Prepared

The defendant who does not appeal is not furnished with transcripts in California before he has specified his claims of error. This was held to be the rule in *People v. Chavez,* 243 Cal. App. 2d 761, 52 Cal. Rptr. 633. *See, also,* 50 Ops. Cal. Atty. Gen. 124 (1967).

Petitioner does not seek here the transcript of his criminal cases. He brought claims concerning access to legal materials and the courts, and he seeks a transcript of the evidentiary hearing on those issues so he can go to the California appellate courts and the federal courts.

We submit that he is not entitled to such a transcript without a showing of need, and he must present his allegations first. At that time, it can be decided whether a transcript has to be prepared or whether the allegations may be disposed of without the expense and effort involved, or in some other way. Petitioner does not allege any inability to summarize the evidence or to frame allegations based upon it. What he did say in his motion of transcripts was conclusory. (A.36.) What

he said in his original petitions did not necessarily reflect the issues that would be raised in the appellate courts. The Superior Court, in denying the transcripts, explained the proper procedure, but petitioner chose to proceed first to secure the transcripts.

This Court has carefully avoided holding that a free transcript must be furnished in every case on direct appeal from the criminal conviction. It has suggested that other techniques may be just as good. What was said in *Draper v. Washington*, 372 U.S. 487, 495-96 (1963), seems pertinent:

> "Moreover, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. If, for instance, the points urged relate only to the validity of the statute or the sufficiency of the indictment upon which conviction was predicated, the transcript is irrelevant and need not be provided. If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues. Even as to this kind of issue, however, it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted. In the examples given, the fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for

> adequate appellate review. In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds—the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a non-indigent defendant with similar contentions.

In *Griffin v. Illinois,* 351 U.S. 12, 20 (1956), the landmark case in the indigent-transcript area, it was explicitly said, "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it." *Cf. Roberts v. La Vallee,* 389 U.S. 40 (1967).

As Justice Frankfurter said, concurring in the judgment in *Griffin* (at p. 24), "When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process."

California procedure requires a petitioner for habeas corpus, whether he be at the trial or appellate level, to present his claim and then the court in which the claim is offered is to determine the need for a transcript. Petitioner did not follow that procedure and here seeks to enforce a right to compel a transcript from a court other than the one to which he may present his claim. We respectfully submit that the im-

plicit California position not to furnish a free transcript automatically in every case, absent a showing of actual need, is open to no meritorious federal objection. We respectfully submit, too, that the requisite screening procedure of requiring application for the transcript to the court in which the complaint is to be made is also reasonable and open to no federal complaint. Since that court will pass upon the substantive claims, it will be in the best posture to evaluate what transcripts, if any, are necessary in that decisional process.

In *Ex Parte Elmer Davis*, 318 U.S. 412 (1943), it was said that the United States Supreme Court could not assume that a state appellate court would refuse to use its process to bring before it such parts of the record as may be necessary for a decision of the case. This Court said that until the State Supreme Court acted the remedies afforded by state appellate procedure have not been fully exhausted. This would seem to indicate that the proper procedure is first to present the allegations to the state appellate courts, and that only the denial of the substantive allegations, or the procedure by which they are denied, would be reviewable.

See, too, *McLaren v. Peyton*, 262 F. Supp. 120, 121 (W.D. Va. 1966).

B. California Does Not Condition Access to Appellate Habeas Corpus

We are aware that this Court has acted to prevent an indigent from being barred from habeas corpus because he has not paid a filing fee, *Smith v. Bennett*, 365 U.S. 708, or being barred from an appeal in a habeas corpus matter because he cannot pay for transcribing the proceeding in the trial court. *Long v. Dis-*

trict Court of Iowa, 385 U.S. 192 (1966). It was said therein: ". . . a state cannot condition its availability [a post conviction procedure] to an indigent upon any financial consideration." In *Lane v. Brown*, 372 U.S. 477 (1963), it was observed that the *Griffin* principle is not limited to direct appeals, but was extended to post-conviction proceedings. (Appeal transcript allowed in *coram nobis* case where appeal could only be perfected by filing transcript in appellate court.)

California does not condition access to post-conviction relief. Petitioner had an evidentiary hearing in the Superior Court and counsel was appointed for him. His access to the Superior Court was conditioned on no financial consideration.

Neither does California condition petitioner's access to its higher courts, the Court of Appeal and the Supreme Court. Every indigent prisoner may file at either of those levels and set out his allegations in a petition.

It is true that there is no right of appeal by a prisoner from the denial of his petition in the Superior Court. See *Loustalot v. Superior Court*, 30 Cal. 2d 905, 913, 186 P. 2d 673. However, every prisoner—rich and poor alike—has the right to file petitions for habeas corpus in the Courts of Appeal and the California Supreme Court.

C. California's Procedures Have Been Sustained in the Federal Courts

California's screening procedure to evaluate need for transcripts has been sustained in the federal courts. In *Wilson v. Wade*, 390 F. 2d 632, 633-34 (9th Cir. 1968) it was said:

> "There is no doubt but that an indigent state prisoner is entitled to a free transcript for use

in an appeal from his state conviction where that is needed and that he has a like right to a free transcript in order to prosecute a claim for post conviction relief where that is essential in order to permit him to demonstrate his right to such relief. See the cases cited in Roberts v. La Vallee, 389 U.S. 40, 42. But the question here is whether Wade has presented any grounds for post conviction relief, the prosecution of which might require him to have the use of a trial transcript.

"This court dealt with this situation in McGarry v. Fogliani, 9 Cir., 370 F. 2d 42, 44, where we said respecting that appellant: 'He makes no showing whatever that any prejudicial errors occurred that would have called for a reversal of his conviction. There is nothing in the claim that the sentencing judge refused to allow an appeal from the conviction before appellant was sentenced. The right to appeal attached when appellant was sentenced. Nor is the court required to order a copy of appellant's trial transcript merely to enable appellant to "comb the record in the hope of discovering some flaw."'

"In the case before us the trial court failed to find that Wade was claiming that there was any error which occurred in the proceedings which led to his conviction which would warrant the granting of post-conviction relief.

"So far as the district court's findings are concerned, our holding in McGarry v. Fogliani, supra, would require us to say that Wade was not entitled to demand a transcript merely to enable him to comb the record in the hope of discovering some flaw. The judgment must be reversed."

Not only is this California procedure sustained by federal courts, but also it is the general kind of procedure federal courts follow. See *Ketcherside v. United States*, 317 F. 2d 807 (6th Cir. 1963); *United States v. Glass*, 317 F. 2d 200, 202 (4th Cir. 1963); *Jarvis v. United States*, 381 F. 2d 712, 713 (9th Cir. 1967); *United States v. Newsome*, 257 F. Supp. 201, 203 (N.D. Ga. 1966); *Tayler v. U.S.*, 238 F. 2d 409, 411 (9th Cir. 1956); *United States v. Shoaf*, 341 F. 2d 832 (4th Cir. 1964); *United States v. Myers*, 241 F. Supp. 85 (E.D. Pa. 1965); *United States v. Wiley*, 238 F. Supp. 1008 (D.D.C. 1965); *Application of Pruitt*, 119 F. Supp. 737 (W.D. S.C. 1954).

D. California's Rule About Transcripts Parallels Other Rules

California sets a similar test either for the appointment of counsel or for the conduct of a hearing. *People v. Shipman*, 62 Cal. 2d 226, 230-231, 42 Cal. Rptr. 1. The rule is also well developed in federal courts that appointment of counsel in habeas corpus proceedings is not automatic, as at trial or on direct appeal. See: *Eskridge v. Rhay*, 345 F. 2d 778, 782 (9th Cir. 1965), cert. denied, 382 U.S. 996, 86 S. Ct. 582, 15 L. ed. 2d 483, reh. denied, 383 U.S. 922, 86 S. Ct. 903, 15 L. ed. 2d 679; *Hatfield v. Bailleaux*, 290 F. 2d 632, 635 (9th Cir. 1961), cert. den. 368 U.S. 862, 82 S. Ct. 105, 7 L. ed. 2d 59; *Schlette v. Peo. of State of Calif.*, 284 F. 2d 827, 836 (9th Cir. 1960).

Under this rule it is clear that a person in custody would not normally be entitled to counsel to assist him in finding allegations to make on habeas corpus.

The rule followed in California regarding transcripts parallels the rule that prevails with regard to counsel.

Both rules place the rich in a better position than the poor, but this court does not condemn all discriminations, only those that are invidious. This is a line that is properly drawn due to the expense involved in preparing transcripts and the possibility of abusive demands by prisoners.

E. Petitioners Cannot Properly Rely on Long to Invalidate California Rules

Petitioner seeks to meet this situation by placing reliance upon *Long v. Dist. Court of Iowa*, 385 U.S. 192 (1966), wherein it was held that on appeal in a habeas corpus case, appeal being allowed in Iowa, a transcript had to be furnished under the circumstances apparent there. He argues that only the "narrow difference" between appeal and an original writ proceeding in the appellate court could provide a distinction from *Long* and he urges that the "basic conditions" underlying *Long* and *Griffin* are present at bench. (Pet. Op. Br. p. 12.)

In approaching this contention, permit us to make several preliminary observations. First, the argument bears the implication (although the implication may not have been intended) that in the ordinary appeal after a denial of a habeas corpus petition the indigent will always, or almost always, secure a transcript whereas he is deprived because of the "one peculiar facet of California habeas corpus procedure."

Actually, in the federal courts, for example, the individual whose petition is denied cannot appeal without a certificate of probable cause. 28 U.S.C. §2253. Our experience has been that such a certificate is denied in a substantial number of cases in Southern California and we can recall only rare instances in South-

ern California where a reporter's transcript of a habeas corpus hearing concerning a state prisoner has been prepared for a federal appeal.

Neither has California attempted to evade or avoid the holding of the *Long* case (*Long v. Dist. Ct. of Iowa, supra,* 385 U.S. 192) by not allowing an appeal. California procedure is a continuation of the common law, where a denial of the Writ of Habeas Corpus was not a final judgment, was not subject to the doctrine of res judicata and need not be reviewed by an appellate court since the petitioner was entitled to present his petition anew to every judge in the realm, trial and appellate. See *Fulks v. Walker,* 224 Ark. 639, 641, 275 S.W. 2d 873 (1955); *see* also *Sanders v. United States,* 373 U.S. 1, 8 (1963).

Nor should it be assumed that California's method is necessarily inferior to an appeal procedure. It is faster and this is in large part due to the reliance on allegations instead of transcripts and briefs. In fact appellate habeas corpus is resorted to where appeal would be too slow. *In re Ali,* 230 Cal. App. 2d 585, 590, 41 Cal. Rptr. 108; *In re Howe,* 135 Cal. App. 2d 604, 607, 287 P. 2d 510; *In re Sweet,* 113 Cal. App. 2d 413, 414, 248 P. 2d 94.*

In an original writ proceeding in the appellate court, the petitioner may have the advantage of having the

*This element of speed bears on the federal-state relationship and the exhaustion of state remedies. This Court has expressed interest in the promptness with which claims are adjudicated. *Peyton v. Rowe,* 391 U.S. 54, 62 (1968). While it may be possible to find occasional writ cases that do not progress speedily through California appellate courts, the rapidity with which petitioner went through the California court system to bring four petitions for certiorari to this court is a convincing laboratory demonstration of this particular advantage.

appellate court make factual determinations so that he does not have to return to the trial court that ruled against him.

It may also be noted that California's appellate writ procedure may involve review of the lower court proceeding and operate as if it were an appeal. *In re Perkins*, 165 Cal. App. 2d 73, 81, 331 P. 2d 712 said: "It does not occur to us that that remedy [habeas corpus] is any more or less efficacious than would be an appeal." *In re Jones*, 260 A.C.A. 957, 961 reviewed on appellate habeas corpus errors occurring in the conduct of a collateral attack proceeding in the court below.

Yet it would not do justice to California procedure to describe appellate habeas corpus as an appeal. There are at least three possible reviews at three different levels of the judicial hierarchy, each independent of the other, and each extending to the facts as well as the law, with every level of the court system able to conduct a full new inquiry, and the usual practice is to make a fresh determination.

This Court has not held that states must establish avenues of appellate review. *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966). It is submitted that California has by far surpassed this standard with a full scale appellate remedy that provides relief in a number of respects superior to that in an appeal.

Turning more directly to an analysis of the *Long* holding, we note that petitioner recognizes that there

is a difference in Iowa and California procedure, that Iowa allows appeals from denials of habeas corpus, while California utilizes an original writ proceeding. He terms this a narrow difference, but the distinctions in form and procedure between an appeal and an application for habeas corpus are considerable and well recognized. The former involves direct review of a judgment below; the latter encompasses pleading in an original proceeding where the issues are developed by means of allegations.

In pressing the claim that the basic considerations underlying *Griffin* and *Long* are present here, he advances several arguments, which we evaluate as follows:

1. He argues that his claim is inherently complex. It is submitted that in comparison to the usual lawsuit the factual issues here were simple. Petitioner said he was not supplied enough law books. This involved establishing what books were in the prison library and available to him through the State library. He said his personal legal materials were not allowed to him. This too involved a determination of what he was allowed in his cell, what was kept from him by the prison authorities and when and how he could see it, and what he sent home, and whether anything had been destroyed.

2. Petitioner speaks of the discretion of a reviewing court to grant a hearing and he speaks of a "considerable skepticism" that he has to overcome with transcript references. (Pet. Op. Br. pp. 14, 17.) He cites no cases that authorize a discretion to reject an adequate allegation of a deprivation of a federal constitutional right. Nor does he cite cases that allow a skep-

ticism of adequate allegations to be a sufficient basis for rejecting them. Our understanding of the law is that if the allegations are sufficient the private opinion of the court as to the likelihood that the allegations could win evidentiary support is irrelevant. *See Wright v. Dickson*, 336 F. 2d 878, 881 (9 Cir. 1964); *Pike v. Dickson*, 323 F. 2d 856, 861 (9 Cir. 1963).

3. Petitioner points to the fact that the superior court issued an order to show cause. The inference arises that this endorses the petition as substantial and as necessitating a "careful scrutiny of the facts and weighing of the relevant policies." (Pet. Op. Br. p. 15.) We respectfully submit that the decision to issue an order to show cause or to grant a hearing does not involve an endorsement of the claim. An examination of the allegations is not a sufficient basis for judging the strength of the proof that later may be adduced in support thereof. *See Ingle v. Fitsharris*, 283 F. Supp. 205, 207 (N.D. Calif. 1968); see too footnote 2 on page 162 in *Benson v. State of California*, 328 F. 2d 159 (9 Cir. 1964).[4]

---

[4]Petitioner also makes the following argument: "Had he instead chosen to proceed first in the Court of Appeal, he would clearly have been entitled to petition the California Supreme Court for a hearing followed by a denial and would thus have been within the precedents of this Court requiring the provision of a free transcript." (Pet. Op. Br. p. 13.) California appellate courts normally require that a factual issue first be presented to a trial court. *In re Hillery*, 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759. When the California appellate court does hold an evidentiary hearing it is invariably done by selecting a referee and having him hear the facts, with the court reviewing the findings. E.G. *In re Riddle*, 57 Cal. 2d 848, 853, 22 Cal. Rptr. 472. Inherent in this procedure of having the court review the findings of the referee is the court's examination of a transcript of the evidence. Thus there could be no issue about preparing the transcript subsequently to present it to a higher or federal court as it has already been prepared.

F. Any Value to Petitioner in Having Transcripts of the Evidentiary Hearing Before He States His Allegations Is Outweighed by the Economic Waste in Permitting It Without Such a Screening

The main argument seems to be that petitioner needs the transcripts in order to frame his allegations to the appellate courts. Certainly petitioner did not make a substantial showing of any special need in his particular case. That is, he didn't allege that he had forgotten the testimony or that he had any other inability with respect to writing his recollections into new allegations. He was at least as well off in going to the appellate courts as he was coming into the Superior Court. He spoke of wanting the transcript "as reference in the aid of the preparation for a writ." His position seems to rest on the assumption that need comes about from only the circumstance of applying to a higher court for a writ. He argues that any person with funds would obviously have made such a transcript available to the court, and that when appealing the Attorney General would receive a transcript. He asserts that a nonindigent could purchase a transcript to more effectively prepare and prosecute his further petitions.

As to the fact that the Attorney General would secure a copy of the transcript if he takes an appeal after habeas corpus is granted to a prisoner, this is undoubtedly true, but the circumstances are fundamentally dissimilar. The courts in this area are obliged to deal with a large number of applications from prisoners and reasonable procedures for processing them are necessary. The federal rules do not require an Attorney General to secure a certificate of probable cause. Rule 22(b) of the Federal Rules of Appellate

Procedure. While the petitioner can file new applications in the appellate courts, unless the Attorney General has this right of appeal the government would be cut off entirely. See *Matter of Hughes*, 159 Cal. 360, altered by the later adoption of section 1506 of the California Penal Code.

Turning to the issue of need for the transcript, it is perhaps not unreasonable to note that need also is not a mathematical word. What one "needs" may depend to some extent on one's accustomed standard of living. Two points of reference, however, may be fairly fixed. The transcript is not a condition precedent to having the appellate court consider the case. It is not only possible to proceed by framing allegations without the transcript but usual to do so. On the other hand, it cannot be said that the transcript would necessarily be totally valueless in the process of applying for a writ in the appellate court.

However, because petitioner has prepared allegations in the Superior Court that have resulted in a hearing, he has afforded us a convincing demonstration that he is able to make a similar presentation to the appellate court. His consultations with an attorney through the hearing and the evidentiary hearing itself should put him in a better position to present a new petition. As it is not the law that a petitioner is entitled to an evidentiary hearing to help him frame his allegations, so it should not be the law that he is entitled to a transcript of such an evidentiary hearing. We submit that it can fairly be said that need and value under these circumstances are relatively slight, and may be nonexistent. Certainly evidence to support the allegations is not essential in presenting a habeas corpus

petition, which is scrutinized as a pleading. Petitioner's concession that he had a full and fair hearing in the Superior Court (A.36, 47, 56) would make a transcript unnecessary to review errors in that category.

To the extent that there would be value to the petitioner, we would place the situation in the general rule that does not make appointment of counsel automatic, or the furnishing of the transcript of the criminal case automatic, or a hearing automatic. Whatever aid the transcript would be is under these circumstances outweighed by the economic cost involved in furnishing it without a showing of specific need and substantiality of the issues. It would be anomalous unconditionally to furnish a petitioner a transcript of the hearing on his habeas corpus case without any test but not let him have the transcript of his criminal trial to bring habeas corpus until he supplies allegations. See *People v. Hill*, 67 Cal. 2d 105, 122-125, 60 Cal. Rptr. 234.

It may be true that a man of immense weath would want a transcript of his hearing for appellate purposes. It might also be true that a nonindigent of even substantial means would feel that this is not a prudent expenditure of funds. We do not have an obligation to obliterate the lines between rich and poor regardless of the lack of practicality or the expense involved. As the Court reminded us in *Douglas v. California*, 372 U.S. 353, 356-57 (1963):

> "But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' *William v. Lee Optical Co.*, 348 U.S. 483, 489; *Griffin v. Illinois*, supra, p. 18.

Absolute equality is not required; lines can be and are drawn and we often sustain them. See Tigner v. Texas, 310 U.S. 141; Goesaert v. Cleary, 335 U.S. 464."

Thus we conclude that it does not offend equal protection or due process to require allegations to precede the furnishing of transcripts.[5]

G. The Federal Habeas Corpus Remedy Is Not Impaired by California's Procedures

Finally, we turn to petitioner's contention that the failure to give him this transcript impairs the effectiveness of the federal habeas corpus remedy. He seems to be dissatisfied with the way 28 U.S.C. section 2254 has been amended and seeks to have this court repair the alleged deficiencies in the power of the federal courts to order a transcript by having the state supply he transcript as a matter of absolute right. (Pet. Op. Br. p. 19.)

---

[5]As the Court is aware, there are two other petitions for certiorari by petitioner pending before it, filed as Nos. 894 Misc. and 1061 Mis., October Term 1967. The story of what happened after the request for transcripts in the Superior Court is unfolded therein. They tell that petitioner presented his substantive allegations in the State Supreme Court in the form of petitions for mandamus or injunction in the latter part of June 1967, and for habeas corpus in July, and they were denied. (Copies of the documents were furnished as exhibits to the petition for certiorari filed on November 7, 1967. However, after the evidentiary hearing in the Superior Court and before the petitions in the Supreme Court, the State Supreme Court decided *In re Allison*, 66 Cal. 2d 282, 288-292, 57 Cal. Rptr. 593 and *In re Schoengarth*, 66 Cal. 2d 295, 305, 57 Cal. Rptr. 600. The thorough review of the prison regulations in those cases and the sustaining of them at the least greatly reduced the need for a transcript. Possibly petitioner could contend his "need" continued to exist to make a presentation to this court or federal courts, see *Gilmore v. Lynch*, ... F. 2d ...., Ninth Circuit No. 22052, decided August 19, 1968, or that some issue was not fully covered by *Allison* and *Schoengarth*. He complained that Allison infringes on the rights of California prisoners and that the Department had "perverted" the decision. (Pet. for Mand., p. 10.)

Prior to the amendment of the statute, the federal courts were insistent upon the federal district judge reviewing the state transcript before the findings from the state hearing could be accepted in lieu of conducting a federal hearing. *See Pike v. Dickson*, 323 F. 2d 856, 861 (8 Cir. 1963); *Chaves v. Dickson*, 280 F. 2d 727, 733 (8 Cir. 1960).

The general effect of the amendment appears to be to permit a federal district judge to accept the written findings of a state court without going into the transcript unless the findings are challenged in some way as not being supported by the evidence or because the hearing was not fair.

It also vests a new power in the District Courts to order "an appropriate State official" to produce a state record where the applicant challenges the sufficiency of the evidence to support the state determination. 28 U.S.C. §2254(e).

It conspicuously avoids any right to transcripts merely for the purpose of preparing the petition and the power to order the preparation of transcripts is vested in the court before which the allegations are made at a time subsequent to the making of the allegations.

If there is a suggestion that the statute will be applied unfairly, we can only express confidence that the federal courts will not so interpret it or apply it. Apart from the general situation that the petitioner must express his allegations, we see no substantial limitation on the petitioner. The statute simply appears to be aimed at not requiring the preparation of transcripts unless some complaint is made of the state fact finding process.

Petitioner cites Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 Yale L. J. 895 (1966). This does not support him, and merely speaks (at p. 928) of requiring states to prepare records for indigent *prisoners who raise substantial questions in federal habeas corpus petitions.*" (Emphasis added.) Citing 28 U.S.C. §2250 (1964).

Conclusion

For the foregoing reasons it is respectfully requested that the order of the San Luis Obispo Superior Court be affirmed.[*]

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

JACK K. WEBER,
Deputy Attorney General of the State of California,

Attorneys for Respondent.

---

[*]We note that appointed counsel has not urged some of the claims advanced in the petition for writ of certiorari, particularly that the Superior Court was arbitrary in changing the label of the petition for a writ of mandamus to habeas corpus, a nonappealable proceeding for a petitioner. However, we have limited ourselves to answering the arguments advanced in the petitioner's opening brief.

APPENDIX

28 U.S.C. § 2254(d):

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(e):

If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order

directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

28 U.S.C § 2250:

"If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

Federal Rules of Appellate Procedure, Rule 22(b):

In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed,

the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.

Penal Code § 1506:

An appeal may be taken to the court of appeal by the people from a final order of a superior court made upon the return of a writ of habeas corpus discharging a defendant or otherwise granting all or any part of the relief sought, in all criminal cases, excepting criminal cases where judgment of death has been rendered, and in such cases to the Superior Court; and in all criminal cases where an application for a writ of habeas corpus has been heard and determined in a court of appeal, either the defendant or the people may apply for a hearing in the Supreme Court. Such approval shall be taken and such application for hearing in the Supreme Court shall be made in accordance with rules to be laid down by the Judicial Council. If the people appeal, or petition for hearing in either the court of appeal or the Supreme Court, the defendant shall not be discharged from custody pending final decision upon the appeal or petition for hearing and he must, in any case in which a judgment of conviction has become final, be retaken into custody if he has been discharged; provided, however, that in bailable cases the defendant may be admitted to bail, in the discretion of the judge, pending decision of the appeal or petition for hearing. If the order grants relief other than a discharge from custody, the trial court or the court in which the appeal or petition for hearing is pending may, upon application by the people, in its discretion, and upon such conditions as it deems just stay the execution of the order pending final determination of the matter.

Office-Supreme Court, U.S.
FILED
DEC 7 1968
JOHN F. DAVIS, CLERK

No. 73

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

ROBERT NEWTON GARDNER, JR.

v.

THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI

SUPPLEMENTAL MEMORANDUM ON BEHALF OF PETITIONER

CHARLES E. RICKERSHAUSER, JR.
606 South Hill Street
Eleventh Floor
Los Angeles, California

Attorney for Petitioner

This memorandum has been prepared in response to the request of Mr. Justice Fortas for a report concerning how many of the States have habeas corpus procedures which do not provide for review, in a traditional appellate manner, of denials of relief by trial courts. Because of the shortness of time available, research has been restricted to an attempt to ascertain the extent to which the states permit direct appeal from a final judgment adverse to the petitioner in the trial of a habeas corpus action arising out of a criminal case. It should also be noted that due to the complexity of the indexing systems and the myriad potential sources of the various state rules, it is possible that some discrepancy may exist between the authorities reported herein and the applicable practices of the states.

In general, investigation has revealed the following breakdown. Thirty-six states provide for review by direct appeal. Five states (Arkansas, Louisiana, Missouri, North Carolina and North Dakota) permit review by certiorari or supervisory writ. Colorado provides for review by writ of error. An unsuccessful attempt has been made to discover whether this is a writ of right under Colorado law. Seven states (California, Maryland, Montana, Oklahoma, Rhode Island, Vermont and Wyoming) expressly prohibit appeal. Hawaii appears to restrict original jurisdiction to issue the writ to the Supreme Court, so the question of appealability does not arise in that state.

A more detailed discussion of the various state procedures follows.

At the appellate level, habeas corpus procedures are by no means uniform throughout the United States. Both statutory and decisional law have been examined in each jurisdiction. It is appropriate to note certain factors at the outset, as they have some bearing on the treatment of the writ by the legislatures and the courts of the different states.

Habeas corpus derives from the common law and was classically regarded as a writ of right. Perhaps for this reason the constitution of every state, following the United States Constitution, provides that the writ shall not be suspended except (in some states) in cases of invasion or rebellion. It also appears that under the common law there was no right of appeal from a judgment in a habeas corpus proceeding except such as might be granted by constitution or by statute. Thus there is a presumption of nonappealability underlying the courts' interpretation of the statutory material.

The majority of the states view habeas corpus as a civil proceeding. Some regard it as an extraordinary proceeding available only in a limited class of situations. Some regard it as a criminal proceeding. The traditional, more widespread view is that it is a civil action. Since the writ is available in civil custody cases (usually involving detention of minor children) as well as to convicted prisoners, the law of a number of jurisdictions has drawn a distinction between these two types of cases and has adopted its rule as to the availability of appeal accordingly. A further distinction is drawn by statute between the right of the state and the right of the individual to appeal from an adverse judgment. In this memorandum such distinctions are noted when they have appeared

significant, and an attempt has been made throughout to cite to decisions in habeas corpus cases arising out of criminal proceedings.

It should also be noted that at least eleven states (Delaware, Florida, Illinois, Kentucky, Maryland, Missouri, Montana, Pennsylvania, Vermont, West Virginia and Wyoming) have adopted specific post-conviction legislation providing for review and correction of sentences on motion to a court of general jurisdiction. In some states this legislation has supplanted traditional habeas corpus relief; in some states it merely supplements it. An attempt has been made herein to ascertain the effect of such legislation in the various states.

Alabama

A right of appeal is provided by statute. Ala. Code tit. 15, §369(a) (1940) grants the right "to any party aggrieved by the judgment on the trial of a habeas corpus". The Alabama Supreme Court has held that this section applies to state prisoners. Banks v. State, 275 Ala. 504, 156 So.2d 364 (S.Ct. 1963), Price v. Holman, 279 Ala. 324, 184 So.2d 835 (S.Ct. 1966).

Alaska

By statute, a right of appeal is granted to "a party to a proceeding by habeas corpus" from a final judgment denying the writ. Alaska Code Crim. Proc. §12.75.230 (1962). Appeal to the Supreme Court is a matter of right, and that court also has concurrent original jurisdiction with the superior courts to issue the writ. Alaska Judiciary Code §§22.05.010, 22.10.020 (1962). No reported decisions have been found interpreting or applying these sections to habeas corpus proceedings involving state pirsoners.

Arizona

In Arizona, a petitioner in a habeas corpus proceeding may appeal from an order or judgment refusing his discharge. Ariz. Rev. Stat. §12-2101 L.1 (1955). The provision was originally enacted in 1913. Habeas corpus is treated as a civil proceeding, and no distinction is made between habeas corpus actions arising out of criminal or civil proceedings, for the purpose of appeal. Application of Anderson, 6 Ariz. App. 563, 435 P.2d 70 (1967). The Supreme Court and the superior courts have concurrent jursidiction to issue the writ. Ariz. Rev. Stat. §13-2003 (1955).

Arkansas

Under Arkansas law there is no express statutory right of appeal from a judgment in a habeas corpus proceeding. It appears from the decisions that for many years the only available means of obtaining appellate review of any such judgment was by petition for a writ of certiorari. This rule obtained both in cases arising out of criminal proceedings and in those involving custody of minor children. See, e.g., Ex parte Jackson, 45 Ark. 158 (S.Ct. 1885), Ex parte Holdaway, 105 Ark. 1, 150 SW123 (S.Ct. 1912), Johnston v. Lowery, 181 Ark. 284, 25 SW2d 436 (S.Ct. 1930). In 1955 the Arkansas Supreme Court held that appellate review of habeas corpus proceedings in child custody cases had become a matter of right in the state and henceforth would be governed by the statute pertaining to appeals. The court specifically confined its ruling to child custody cases however. Fulks v. Walker, 224 Ark. 639, 275 SW2d 873 (S.Ct. 1955). No decisions have been found in which the court ruled on the applicability of Fulks v. Walker to habeas corpus petitions by

state prisoners. On this basis it is concluded that no right of direct appeal exists in such cases.

California

The statutory provisions for appeals in habeas corpus cases involving a criminal defendant are set forth in Cal. Penal Code §1506 (1927). The section grants the right of appeal to the people "from a final order of a superior court ... discharging a defendant in a criminal case." Cal. Penal Code §1507 (1959 as amended 1967) permits appeal from an order of a superior court in non-criminal cases to "any person other than a defendant in a criminal case." Under the provisions of Cal. Penal Code §1475, a "prisoner" may petition either the appropriate superior court, the court of appeals or the supreme court, all of which have concurrent original jurisdiction to issue the writ.

The California courts have uniformly ruled that §1506 operates to defeat a state prisoner's attempts directly to appeal from an order of a superior court denying his petition for habeas corpus. People v. Lempia, 144 Cal.App.2d 393, 301 P.2d 40 (1956), cert. den. 353 U.S. 916 (1956), People v. Dowding, 185 Cal. App.2d. 274, 8 Cal. Rptr. 208 (1960), People v. Griggs, 67 Cal.2d 314, 61 Cal. Rptr. 641, 431 P.2d 225 (S.Ct. 1967).

Colorado

In Colorado, habeas corpus actions are held to be civil in nature and judgment therein is reviewable by writ of error. People ex rel. Metzger v. District Court, 121 Colo. 141, 215 P.2d 327 (S.Ct. 1949), Barrett v. People, 136 Colo. 144, 315 P.2d 192 (S.Ct. 1957). By statute, the only method for review by the supreme court of a lower court judgment is by writ of error.

Colo. Rev. Stat. 37-2-26 (1963). There appear to be no intermediate appellate courts in the state.

Connecticut

Conn. Gen. Stat. Ann. §52-470 (as amended 1967) provides:

> "The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments therein, and inquire fully into the cause of imprisonment, and shall thereupon dispose of the case as law and justice require. No appeal from the judgment rendered in a habeas corpus proceeding brought in order to obtain his re-release by or in behalf of one who has been convicted of crime shall be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or a justice of the supreme court to certify that a question is involved in the decision which ought to be reviewed by the supreme court and the judge so certifies."

No cases have been found construing this section.

Delaware

The Delaware constitution confers appellate jurisdiction on the supreme court to receive appeals from the superior court in civil and criminal causes. Del. Const. Art. 4, §11 (1897, as amended 1960). The superior court has jurisdiction to issue the writ of habeas corpus. 10 Del. Code Ann. §6901 (1953). In addition, the superior court has authority to correct an illegal sentence at any time, on motion by the prisoner, and may reduce a sentence under certain circumstances. 13 Del. Code Ann. Superior Ct. Rules, Crim. Rule 35 (1953, as amended 1960). The Delaware Supreme Court has ruled that a prisoner seeking habeas corpus relief in the superior court must first exhaust the remedies available under Rule 35. Curran v. Woolley, 48 Del. (9 Terry) 382, 104 A.2d 771 (S.Ct. 1954).

In 1959 a provision that an indigent prisoner shall be furnished a free copy of the transcript of the testimony in an appeal from the denial of a petition for habeas corpus was adopted by the state supreme court. 13 Del. Code Ann. S.Ct. Rule 10A (1959).

Florida

In Florida "any party or persons aggrieved" by a judgment in a habeas corpus proceeding appears to have a right of appeal. The right was conferred by Fla. Stat. Ann. §79.11 (1822, repealed 1967). The state constitution provides appeals from final orders of trial courts to either circuit courts or the supreme court as a matter of right. Fla. Const. Art. 5 §5(3) (1885, as amended 1960). In 1964 the state supreme court held that §79.11 was fully superseded by the above amendment to the constitution and by the Florida Appellate Rules and, in dicta, recommended that the section be repealed. State ex rel Callahan v. Michell, Fla. 170 So2d. 291 (S.Ct. 1964).

In addition, Rule 1.800 of the Florida Rules of Criminal Procedure provide for the correction or reduction of an illegal sentence. Under Florida law, habeas corpus is viewed as a civil proceeding. State ex rel Lee v. Buchanan, Fla. 191 So2d. 33 (S.Ct. 1966).

Georgia

In Georgia appeals in habeas corpus cases are provided by statute, and such appeals are governed by the Appellate Procedure Act of 1965. Georgia Code Ann. §50-126 (1933), §50-127(11)(1967). Under that statute, final judgments and rulings of trial courts

are appealable to the court of appeals and then to the supreme court. Georgia Code Ann. §6-701 (1965), Georgia Const., Code Ann. §2-3704 (1945), Ramirez v. State, 223 Ga. 815, 158 S.E.2d 235 (S.Ct. 1967).

Hawaii

Under Hawaii law, at present, it appears that no court save the supreme court has jurisdiction to issue a writ of habeas corpus, as the state legislature has not yet enacted any specific legislation with respect to the writ. The supreme court's authority derives from the state constitution. Hawaii Const. Art. 5, §§1 and 6 (1959). Only one reported case has been found where the Supreme Court ruled on an original petition for the writ, In re Habeas Corpus Balucan, 44 Haw. 271, 353 P.2d 631 (S.Ct. 1960).

Idaho

In Idaho, the writ may be granted either by the supreme court or the district courts. Idaho Code 19-4203 (1947). Appeals may be taken to the supreme court from a final judgment of a district court. Idaho Code 13-201 (1947). The state supreme court has held that a district court order denying the release of a prisoner on petition for habeas corpus is appealable. Application of Haney, 77 Idaho 166, 289 P.2d 945 (S.Ct. 1955).

Illinois

Prior to 1962 a denial of a petition was not reviewable in Illinois. A 1962 amendment to the state constitution now confers both original and appellate jurisdiction in cases of habeas corpus on the supreme court, and appeals from final judgments of circuit

courts lie directly to the supreme court as a matter of right. Ill. Const. Art. 6,§5 (1962). This amendment has been held to apply to the quashing of a writ petitioned by a state prisoner. People ex rel Pauling v. Misevic, 32 Ill.2d. 11, 203 N.E.2d 393. (S.Ct. 1964), cert. denied 380 U.S. 963 (1965).

Under the Post-Conviction Hearing Act of 1951, a prisoner may petition the sentencing court for the correction of his sentence on grounds of infringement of his constitutional rights, and any final judgment entered upon such petition may be reviewed by the supreme court as an appeal in civil cases. Ill. Ann. Stat. Ch. 38 §§122-1, 122-7 (as amended 1963).

Indiana

Indiana provides that appeals may be taken directly to the supreme court both from final judgments and interlocutory orders in habeas corpus cases. Ind. Stat. Ann. §4-214 Fifth and Fourteenth (1963), Houtchens v. Lane, 246 Ind. 542, 5 Ind. Dec. 241, 206 N.E.2d 131 (S.Ct. 1965).

Iowa

In Iowa appeals are provided from final judgments to the supreme court, and "any party aggrieved by an interlocutory ruling or decision" may apply to the supreme court to grant an appeal in advance of final judgment. Iowa Code Ann., Rules of Civil Procedure, Rule 331 and 332 (1945). The state supreme court has ruled that an order refusing to issue a writ of habeas corpus is a final appealable order. Alberts v. Lainson, 250 Iowa 748, 94 N.W.2d 94 (S.Ct. 1959).

Kansas

Kansas provides appeal as a matter of right to the supreme court from an order that grants or refuses to grant relief in the form of habeas corpus. Kan. Stat. Ann. 60-2102 (a)(2) (1963). Interpreting the former version of this statute, the state supreme court held that a state prisoner may appeal as a matter of right from a district court judgment discharging the writ. Andrews v. Hand, 190 Kan. 109, 372 P.2d 559 (S.Ct. 1962), cert. denied 371 U.S. 880 (1962).

Kentucky

Kentucky provides that any party to a hearing on a writ of habeas corpus may appeal the judgment to the Court of Appeals. Ken. Rev. Stat. §419.13(1) (1962). The Court of Appeals is the supreme court of Kentucky. Ken. Const. §109 (1891). The state also provides a post-conviction remedy for correction or reduction of sentence. Rules Crim. Proc. 11.42 (1962). The Court of Appeals has held that this remedy must be exhausted before habeas corpus is available to a detained prisoner. Ayres v. Davis, Ky. 377 S.W.2d 154, 878 (S.Ct. 1964), cert. denied 379 U.S. 848 (1964).

Louisiana

The Louisiana Supreme Court has general supervisory jurisdiction over all inferior courts but the right of direct appeal thereto is restricted to a limited class of cases. La. Const. Art. 7, §10 (1921, as amended 1958). The court has held that it is without authority to review on appeal the judgment of a trial court in a habeas corpus proceeding in a criminal case. State v. Ames, 249 La. 685, 190 S.O.2d 223 (S.Ct. 1966), State ex rel. McIsaac v. Sigler, 236 La. 773, 109 S.O.2d 89 (S.Ct. 1959).

The constitution grants only limited civil jurisdiction to the courts of appeal, La. Const. Art. 7, §29 (1921, as amended 1958). Habeas corpus in cases arising out of criminal confinement is viewed as a criminal matter. Under this view the Louisiana rule appears to be that the intermediate appellate courts lack appellate, supervisory and original jurisdiction over petitions for habeas corpus arising out of commitment because of criminal proceedings. State ex. rel. Jones v. Sheriff of Calcasieu Parrish, La., 185 So.2d 80 (Ct. App. 1966).

Maine

14 Me. Rev. Stat. Ann. §5508 (1963) provides for appeal for a final judgment in criminal habeas corpus trials by both the petitioner and the state to the Supreme Judicial Court "in the same mode and scope of review as any civil action". Rules 75(a)&(d) of the Maine Rules of Civil Procedure (as amended 1962 and 1964) have been held to apply to an appeal by a criminal petitioner in such a case. Beaulieu v. State, 161 Me. 248, 211 A.2d 290 (S.Ct. 1965)

Maryland

The statutory provisions for appeal in habeas corpus proceedings were amended in 1958 by the Post-Conviction Procedure Act, Md. Ann. Code Art. 27, §245A (1958, as amended 1962, 1965, 1966). That section specifically applies only to the right of appeal of convicted persons. It has been held by the Court of Appeals of the state [the highest court] that the Post-Conviction Procedure Act abolished the right of appeal from an adverse decision in a post-conviction habeas corpus proceeding. State v. Musgrove, 241 Md. 521, 217 A.2d 247 (S.Ct. 1966), Cumberland v. Warden of Maryland Penitentiary, 225 Md. 636, 171 A.2d 709 (S.Ct. 1961)

cert. denied 369 U.S. 855 (1962). However, under Md. Ann. Code Art. 41 §25 (1951, as amended 1963), an accused person has the right to apply for a writ of habeas corpus and denial of an application in extradition cases only is appealable to the Court of Appeals.

Massachusetts

Mass. Gen. Laws Ann. Ch. 231, §96 (1820) provides that "any party aggrieved . . by any order decisive of the case" has a right of appeal to the Supreme Judicial Court. That court has held this language applicable to an appeal by a state prisoner from a trial court's denial of his petition for habeas corpus relief. Stearns, Petitioner, 343 Mass. 53, 175 N.E.2d 470 (S.Ct. 1961), Needel, Petitioner, 344 Mass. 260, 172 N.E.2d 125 (S.Ct. 1962), Maki v. Superintendant of Mass. Correctional Institution, 349 Mass. 519, 209 N.E.2d 185 (S.Ct. 1965).

Michigan

The law in Michigan on the question of appealability is uncertain. Under the General Court Rules of 1963, Mich. Stat. Ann. (1964), Rule 806.2(4) provided appeal by leave to the supreme court. Rule 806 was amended extensively in 1965 and 1966, and the specific provision re habeas corpus proceedings was excluded from the language of the statute. As it now stands enacted, Rule 806.1 grants an appeal as of right "in all criminal and civil matters" to a party aggreived by a final judgment. Rule 806.1, Mich. Stat. Ann. (1964, as amended 1966). The preliminary committee comment on special rules pertaining to the Extraordinary Writs Rules 710-718, General Court Rules of 1963, Mich. Stat. Ann. (1964) specifically calls attention to the

rules' treatment of habeas corpus as an extraordinary legal remedy which "cannot be made to fit into the pattern of ordinary civil actions." Accordingly, by statute, Michigan distinguishes the procedure for habeas corpus in cases of prisoners and in child custody cases. However, the Michigan Supreme Court has ruled that habeas corpus is a civil proceeding, under the authority of a 1948 statute, People v. McCager, 367 Mich. 116, 116 N.W.2d 205 (S.Ct. 1962). Although no cases under have been found specifically ruling on the effect of the 1966 amendment to Rule 806.1, it is concluded that there is a right of direct appeal in Michigan.

Minnesota

Under Minnesota law an order discharging a criminal defendant's application for a writ of habeas corpus is appealable to the supreme court. Minn. Stat. Ann. §589.29 (1941), State v. Collins, 270 Minn. 581, 131 N.W.2d 802 (S.Ct. 1964).

Mississippi

Miss. Code Ann. §1177 (1942) provides a right of appeal from a judgment on the trial of a writ of habeas corpus for a criminal petitioner. Perciful v. Holley, Sheriff, 217 Miss. 203, 63 So.2d 817 (S.Ct. 1953).

Missouri

In Missouri there is no right of direct appeal from a judgment in habeas corpus cases but it is reviewable by the supreme court, courts of appeal and circuit courts by writ of certiorari. Ark. Const. Art. 5, §4 (1945), State ex rel Stewart v. Blair, 357 Mo. 287, 208 S.W.2d 268 (S.Ct. 1948). Denial of

post-conviction relief is appealable, however, under Ann. Mo. Stat. Crim. Rules 27.26 and 28.03 (1953), State v. Cory, Mo. 408 S.W.2d 11 (S.Ct. 1966).

Montana

A Post-Conviction Hearing Act of 1967 provides a right of appeal to the state from a judgment discharging a petitioner on habeas corpus. Mont. Code Crim. Proc. 95-2714 (1967). Under prior law, an appeal did not lie from an order denying habeas corpus in a criminal case, although it did lie in a civil [child custody] case. State v. Booth, 134 Mon. 235, 328 P.2d 1104 (S.Ct. 1958). On this basis it is concluded that the 1967 statute repeals the prior law only in the case of an appeal by the state.

Nebraska

In Nebraska the denial by a trial court of a prisoner's petition is reviewable by appeal to the court of appeals and to the supreme court. Neb. Const. Art. 1 §24 (1875), Neb. Rev. Stat. §29-2823 (1929), Tail v. Olson, 144 Neb. 820, 14 N.W.2d 840 (S.Ct. 1944), Rhodes v. Houston, 172 Neb. 177, 108 N.W.2d 807 (S.Ct. 1961).

Nevada

In Nevada, the right of appeal is granted by statute, and appeal from a final order denying the writ may be taken to the supreme court. Nev. Rev. Stat. 34.380 (1953). This provision has been held to preclude an additional application for an original writ of habeas corpus to a justice of the supreme court where no new grounds are asserted and the petitioner has not availed himself of the right of appeal. Ex parte Merton, 80 Nev. 435, 395 P.2d 766 (S.Ct. 1964).

New Hampshire

In New Hampshire, application may be made for habeas corpus to the superior court. N.H. Rev. Stat. Ann. 534:3 (1955). The supreme court also has jurisdiction to issue the writ, together with its general supervisory jurisdiction over inferior courts. N.H. Rev. Stat. Ann. 490:4 (1955). No appeal is expressly provided by statute in habeas corpus cases. N.H. Rev. Stat. Ann. 490:10 (1955) provides:

> "Any party aggrieved by ... the judgment of the superior court ... may allege exceptions thereto ... which ... shall be allowed by the presiding justice and be entered in the supreme court for determination."

While no case has been found directly ruling out the question of appealability, it appears that review is available to the supreme court for corrections of errors of law. Springer v. Hungerford, 100 N.H. 503, 130 A.2d 538 (S.Ct. 1957), State v. Murray, 104 N.H. 38, 178 A.2d 507 (S.Ct. 1962).

New Jersey

In New Jersey, jurisdiction to issue writs of habeas corpus is in the superior courts, their judges, and each county judge. N.J. Stat. Ann. 2A:67-15 (1951). A prisoner may appeal a final decision to the appellate division of the superior court. N.J. Stat. Ann. 2A:67-36 (1951). Appeals from a decision of the appellate division of the superior court may be taken to the supreme court on certification, as provided by law. N.J. Const. Art. 6, §5 ¶1 (1947). It has been held that the state has an absolute right of appeal from a judgment discharging a criminal petitioner. State v. Rivas, 16 N.J. Super. 159, 85 A.2d 16 (1951), State v. Daniels, 38 N.J. 242, 183 A.2d 648 (S.Ct. 1962), cert. denied 374 U.S. 837 (1962).

New Mexico

Under New Mexico law, both the supreme court and the district courts have concurrent original jurisdiction to issue writs of habeas corpus. N.M. Const. Art. VI, §§3 and 13 (1911). The supreme court rules appear to allow an appeal to "any party aggrieved" in all civil actions, and specifically provide for appeal by the state in habeas corpus proceedings, and that procedure on appeals in criminal cases is the same as procedure in civil cases. N.M. Stat. Ann. 21-2-1(5) (1929 as amended 1953). The New Mexico courts appear to view habeas corpus as a civil proceeding. Roehm v. Woodruff, 64 N.M. 278, 327 P.2d 339 (S.Ct. 1958), Johnson v. Cox, 72 N.M. 55, 380 P.2d 199 (1963).

New York

Under New York law an appeal may be taken from a final judgment refusing to grant a writ of habeas corpus. CPLR §7011, Con. Laws N.Y. (1963), People v. Gersewitz, 294 N.Y. 163, 61 N.E.2d 427 (S.Ct. 1945), cert. denied 326 U.S. 687 (1945), People ex rel Tatra v. McNeill, 19 App. Div.2d 845, 244 N.Y.S.2d 500 (S.Ct. 1963).

North Carolina

North Carolina law distinguishes, for purposes of appeal, between habeas corpus in criminal cases and child custody cases. Every court of record has authority to issue the writ in both classes of cases. N.C. Gen. Stat. §17-41 (1869). Either party may appeal to the supreme court from a final judgment in child custody cases, but there is no appeal from a judgment in any other class of cases. N.C. Gen. Stat. §17-40 (1859), State v. Renfrow, 247 N.C. 55, 100 S.E.2d 315 (S.Ct. 1957). Review of the

an order denying habeas corpus in criminal cases is by certiorari and rests in the sound discretion of the court. In re Palmer, 265 N.C. 485, 144 S.E.2d 413 (S.Ct. 1965).

North Dakota

Both the supreme court and the district courts have jurisdiction to issue the writ. N.Dak. Const. §§87, 103 (1889). North Dakota makes a distinction between habeas corpus in child custody and in criminal cases, and a final judgment in the former class of cases is one affecting substantial rights and is appealable. Raymond v. Geving, 74 N.D. 142, 20 N.W.2d 335 (S.Ct. 1945). There is no appeal from a final order discharging or remanding a prisoner in habeas corpus proceedings. Carruth v. Taylor, 8 N.D. 166, 77 N.W. 617 (S.Ct. 1898), State ex rel Bismarck v. Dist. Ct., 64 N.D. 399, 253 N.W. 744 (S.Ct. 1934). Such an order can only be reviewed by supervisory writ. State ex rel Bismarck v. Dist. Ct., supra, State ex rel Johnson v. Broderick, 75 N.D. 340, 27 N.W.2d 849 (S.Ct. 1947).

Ohio

Ohio provides that a proceeding upon a writ of habeas corpus may be reviewed on appeal as in other cases. Ohio Rev. Code 2725.26 (1953). It has been held that this statute authorizes appeal from an order denying a writ in a criminal case. Ex parte Karnes, 67 Abs. 455, 121 N.E.2d 159 (App.Ct. 1953).

Oklahoma

Any court of record has original jurisdiction to issue the writ. 12 Okl. Stat. §1333 (1910). No right of direct appeal is provided by statute. The Oklahoma courts have ruled that the supreme court has jurisdiction on appeal to review an order of

the district court in a habeas corpus proceeding involving custody of a minor child, but that no appeal lies from an order in a proceeding brought by a party "imprisoned or restrined of his liberty". Ex parte Johnson, 1 Okla Cr. 414, 98 P.461 (Cr. App. 1908), Sedtke v. Kukuk, 93 Okl. 264, 220 P.615 (S.Ct. 1923), Ex parte Kincaid, 194 Okl. 356, 151 P.2d 796 (S.Ct. 1944), Ex parte Houston, 93 Okl. Cr. 26, 274 P.2d 281 (Cr. App. 1950).

Oregon

A right of appeal is provided by statute to any party to a proceeding by habeas corpus, including the state. Ore. Rev. Stat. §34.710 (1953). Under Oregon law, appeal in habeas corpus cases was not available at common law, but a right of appeal has been granted by the above statute: State v. Endsley, 214 Ore. 537, 331 P.2d 338 (S.Ct. 1958).

Pennsylvania

The statutory provision for appeal by prisoners under sentence from an adverse decision in a habeas corpus proceeding formerly contained in 12 Penna. Stat. Ann. §1907 (1951) have been repealed by the Post-Conviction Hearing Act of 1966, 19 Penna. Stat. Ann. §1180-11 (1966), and appeals by prisoners under sentence are now governed by that statute. It appears, however, that the supreme court continues to grant direct appeal to a criminal defendant from an adverse judgment in habeas corpus. Com. ex rel Kress v. Rundle, 425 Pa. 142, 228 A.2d 772 (S.Ct. 1967).

Rhode Island

Under Rhode Island law, the superior courts have concurrent jurfsdiction with the supreme court to issue the writ of habeas corpus. R.I. Gen Laws §10-9-30 (1905). By statute, appeal from

a superior court judgment is expressly barred. R.I. Gen Laws §10-9-22 (1905). The state supreme court has held that, in view of the statutory scheme granting concurrent original jurisdiction to the superior court, that court's decision denying a prisoner's petition is neither appealable directly nor be means of a petition for certiorari. Lee v. Gough, 84 R.I. 358, 124 A.2d 549 (S.Ct. 1956).

South Carolina

Concurrent jurisdiction to issue the writ is given to the supreme court, the court of common pleas and general sessions, and any two magistrates by statute. So. Car. Code of Laws §§15-121, 17-354 (1932). Appeals from all final decisions rendered on applications for the writ are allowed as in civil actions. So. Car. Code of Laws §17-363 (1932). The statutes have been interpreted as granting a right of appeal both to the state and to prisoners. Douglas v. Hall, 229 S.C. 550, 93 S.E.2d 891 (S.Ct. 1956), Welch v. Mac Dougall, 246 S.C. 258, 143 S.E.2d 455 (S.Ct. 1965).

South Dakota

Concurrent original jurisdiction to issue the writ is given by statute to the supreme court and the circuit courts. S. Dak. Code §37.5503 (1939). The supreme court has appellate jurisdiction to hear appeals from the circuit courts from "any final order affecting a substantial right, made in special proceedings." S.Dak. Code §33.0701 (1939). A circuit court order dismissing a state prisoner's petition is appealable to the supreme court under that section. Ex parte Watt, 73 S.Dak. 436, 44 N.W.2d 119 (S.Ct. 1950).

Tennessee

Ten. Code Ann. §23-1836 (1887) provides:

> "Any party, either relator or defendant, in any habeas corpus case shall have the right of appeal to the proper appellate court from any judgment or decree rendered against such party by an inferior court; provided, that the party so appealing shall give bond and security for the costs of such appeal; and provided, that this section shall not apply to parties held in custody in criminal cases.

It has been held that "in custody in a criminal case" means in a pending case, and that a prisoner held in custody after conviction does not fall within the meaning of the phrase. State ex rel Guy v. Foster, 160 Tenn. 285, 23 S.W.2d 660, 24 S.W.2d 897 (S.Ct. 1930). The petitioner's right of appeal is conditioned on his giving bond; there is no right of appeal on a pauper's oath and an appeal may be dismissed when no bond is filed. State ex rel Strong v. Strong, 175 Ten. 291, 133 S.W.2d 996 (S.Ct. 1939), State ex rel Britt v. Burns, 192 Tenn. 514, 241 S.W.2d 551 (S.Ct. 1951).

Texas

By statute, the Court of Criminal Appeals [the highest court of record in criminal cases], the district courts, the county courts and their judges have concurrent jurisdiction to issue the writ in criminal cases. Tex. Stat. Ann. Code Crim. Proc. Art. 11.05 (1965), Tex. Const. Art. 5 §5(1876, as amended 1891). The defendant [prisoner] may appeal from a judgment rendered on the hearing of an application by an inferior court, and the judgment of the Court of Criminal Appeals in such appeals is final and conclusive. Code Crim. Proc. Arts. 44.34, 44.38 (1965).

Under Texas law, an order refusing to grant a writ of habeas corpus must be a judgment rendered after a hearing in order to be

appealable under the above statutes; the granting of a motion to dismiss an application is not such a judgment and appellate jurisdiction exists only after a hearing on the merits of the case. Nichols v. State, 158 Tex. Cr. 367, 255 S.W.2d 522 (Cr. App. 1953), Ex parte Eidinoff, Tex. Cr., 408 S.W.2d 540 (Cr. App. 1966).

Utah

By constitution and statute the supreme court has concurrent jurisdiction with the district courts to issue the writ. Utah Const. Art. VIII, §§4 and 8 (1895), Utah Code Ann. §78-2-2, 78-3-4 (1943). The supreme court has appellate jurisdiction to review all final judgments of the district courts. Utah Code Ann. §78-2-2 (1943). Rule 72 of the Rules of Civil Procedure authorizes appeals to the supreme court from all final judgments of the district courts in accordance with Utah Const. Art. VIII, §9 (1895).

An early case, applying essentially similar statutory language, held that an appeal from an order of the district court discharging a person from arrest upon a writ of habeas corpus does not lie to the supreme court, in that it is not a final judgment. Mead v. Metcalf, 7 Utah 103, 25 P. 729 (S.Ct. 1891). This case was overruled in Weimovich v. Emery, 33 Utah 345, 93 P.988 (S.Ct. 1908). In that case the court held that habeas corpus is a special statutory civil proceeding in Utah, that the right of appeal from a final judgment of a district court is a constitutional right, and that in a habeas corpus proceeding the judgment of the court which either remands or discharges the petitioner is a final judgment, notwithstanding the fact that another similar proceeding may be commenced by the petitioner if he elects to do so. This holding appears to have been consistently followed by the Utah courts. Young v. Ellett, 106 Ut. 140, 146 P.2d 196 (S.Ct. 1944).

Vermont

Concurrent original jurisdiction to grant the writ is in the supreme court, a judge of the superior court and the county courts. 12 Vt. Stat. Ann §3953 (1947). It appears that no right of appeal is expressly afforded by statute, and the state supreme court has held that the state has no right to appeal an order discharing a prisoner in a habeas corpus action. In re Fitts, 124 Vt. 146, 197 A.2d 808 (S.Ct. 1964). Under the court's reasoning in that case, it would appear that absent an express statutory provision for an appeal by a petitioner, such an appeal would not be held to be available under the general statutes governing appeals in civil and criminal cases, as the court viewed habeas corpus as an extraordinary right or remedy and held that proceedings thereunder are governed by special statutes.

However, a new section dealing with post-conviction remedies was adopted by the legislature in 1966. A prisoner in custody may move the county court to vacate, set aside or correct his sentence and an appeal may be taken to the supreme court from the order entered on the motion. 13 Vt. Stat. Ann. §§7131, 7135 (1966).

Virginia

The supreme court of appeals had concurrent jurisdiction with the circuit courts and corporation courts to issue the writ, and has appellate jurisdiction over habeas corpus proceedings as well. Va. Const. §88 (1902, as amended 1928), Va. Code §§17-97, 8-596 (1919, as amended 1968), Smyth v. Godwin, 188 Va. 753, 51 S.E.2d 230 (S.Ct. 1949), cert. denied 333 U.S. 946 (1949). Under Va Code §8-607 (1919), a petitioner remanded

to custody after the hearing of his petition may apply for a writ of error, under the general statute governing appeals in civil cases. Va. Code §8-462 (1919), Smyth v. Godwin, supra. The term "appeal" includes the term "writ of error". Va. Code Rules of Court, Rule 5:1 §2 (1957).

Washington

In Washington, the supreme court has concurrent jurisdiction to grant the writ together with the superior court. Wash. Const. Art. 4 §§4,6 (1889, as amended 1952), Wash. Rev. Code 7.36.040 (1881), 2.04.010 (1890). The supreme court also has appellate jurisdiction in all actions and proceedings. Wash. Rev. Code 2.04.010 (1890). No case has been found directly ruling on the question of the appealability of a denial of a prisoner's petition for habeas corpus. However, since several sections of the habeas corpus statute provide for procedures "whether in an original proceeding or upon an appeal" (See Wash Rev. Code §§7.36.140, 7.36.250 (1947)) and since cases have been found dealing with the substantive questions involved in habeas corpus proceedings in lower court actions (See e.g., Thorne v. Callahan, 39 Wn.2d 43, 234, P.2d 517 (S.Ct. 1951), In re Pettit v. Rhay, 62 Wn.2d 515, 383 P.2d 889 (S.Ct. 1963)) it is concluded that there is a right of direct appeal in the state.

West Virginia

The supreme court of appeals has both original and appellate jurisdiction in cases of habeas corpus. W.Va. Const. Art. 8, §3 (1872), W. Va. Code §51-1-3 (1931). The Post-Conviction Habeas Corpus Act of 1967 provides for appeal of a final judgment by both the petitioner and the state to the circuit court and thence to the supreme court of appeals. W.Va. Code §53-4A-9 (1967), Pozzie v. Prather, W.Va., 157 S.E.2d 625 (S.Ct. 1967).

Wisconsin

The supreme court, the circuit courts and county courts have concurrent jurisdiction to issue the writ. Wis. Const. Art. 7, §§ 3 and 8 (1848), Wis. Stat. Ann. 292.01 (1849). Wis. Stat. Ann. 274.05 (1898, as amended 1949) provides that the supreme court shall issue writs of error, under certain circumstances, to review an order or judgment of any court discharging or remanding a person, except in the case of a prisoner committed for trial. This section has been held to apply in such cases over the more general language of 274.33, permitting appeal to the supreme court from a final order affecting a substantial right made in a special proceeding. (Wis. Stat. Ann. 274.33 (1860)). Wolke v. Fleming, 24 Wis.2d 606, 129 N.W.2d 841 (S.Ct. 1964), cert. denied 380 U.S. 912 (1964). It should be noted that in Wisconsin a writ of error is a writ of right. Wis. Const. Art. 1, §21 (1848).

Wyoming

The supreme court and the district courts have concurrent jurisdiction to allow the writ. Wyo. Stat. §1-811 (1869, as amended 1945). The Code of Civil Procedure provides for successive application by the petitioner. Wyo. Stat. §1-810 (1869 as amended 1945). It has been consistently held that a decision in a habeas corpus proceeding is not appealable, as the petitioner may avail himself of successive writs before other courts. Brugreax v. Dankowski, 51 Wyo. 103, 63 P.2d 800 (S.Ct. 1936), Briggs v. Wilcox, Wyo., 404 P.2d 752 (S.Ct. 1965).

Wyoming provides a post-conviction procedure whereby a prisoner may petition for review by the sentencing court of the proceedings which resulted in his conviction, on constitutional questions only. Appeals from final judgments may be taken directly to the supreme court. Wyo. Stat. §§7-408.1, 7-408.7 (1961).

Respectfully submitted,

CHARLES E. RICKERSHAUSER, JR.
Attorney for Petitioner

I, Charles E. Rickershauser, Jr., counsel for Robert Burton Gardner, Jr., petitioner, certify that on the 5th day of December, 1968, I served a copy of the Supplemental Memorandum on Behalf of Petitioner on the Attorney General of the State of California by placing a copy of the same in the United States Mail, first-class postage prepaid, addressed as follows:

Hon. Thomas C. Lynch
Attorney General of the
State of California
600 State Building
Los Angeles, California 90012
Attn: Jack W. Sober, Esq.
Deputy Attorney General

CERTIFICATE OF SERVICE

I, Charles E. Rickershauser, Jr., counsel for Robert Newton Gardner, Jr., petitioner, certify that on the 5th day of December, 1968, I served a copy of the Supplemental Memorandum on Behalf of Petitioner on the Attorney General of the State of California by placing a copy of the same in the United States Mail, first-class postage prepaid, addressed as follows:

Hon. Thomas C. Lynch
Attorney General of the
State of California
600 State Building
Los Angeles, California 90012
Attn: Jack K. Weber, Esq.
Deputy Attorney General

Charles E. Rickershauser, Jr.

SUPREME COURT OF THE UNITED STATES

No. 73.—October Term, 1968.

Robert Newton Gardner, Jr., Petitioner, v. State of California.	On Writ of Certiorari to the Superior Court of California, County of San Luis Obispo.

[January 20, 1969.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner is a California state prisoner who filed *pro se* various papers with the State Superior Court alleging state action that interfered with his access to the courts for determination of his claims. The Superior Court, which granted a hearing and designated the Public Defender's office to represent petitioner at that hearing, treated the papers as requests for habeas corpus relief. After hearing, it made findings and held that the State had not impaired petitioner's rights of access to the courts.

Under California law, while the State has an appeal from an order discharging a defendant in a habeas corpus proceeding,[1] the defendant has no appeal where his petition is denied. See *Loustalot* v. *Superior Court*, 30 Cal. 2d 905, 913, 186 P. 2d 673. But he may file a petition for habeas corpus either in the intermediate Court of Appeal or in the Supreme Court.[2] As petitioner in the instant case desired to pursue his remedy in the higher courts, he asked for a free transcript of the evidentiary hearing before the Superior Court. His motion was denied and he sought review of that denial by certiorari to the District Court of Appeal. It was denied, as was

[1] Calif. Penal Code § 1506.

[2] See Calif. Const. Art. 6, § 10; Calif. Penal Code, § 1475; Rules 50 and 190, Calif. Rules of Court.

a timely petition for a hearing in the Supreme Court. We granted the petition for a writ of certiorari, 391 U. S. 902, to consider whether the rulings below squared with our decisions in *Griffin* v. *Illinois*, 351 U. S. 12, and *Long* v. *District Court*, 385 U. S. 192.

We reverse the judgment below. If this involved an appeal from the Superior Court's denial of habeas corpus, the rule of the *Griffin* case would prevent California from not allowing petitioner, an indigent, access to the record which makes any appellate review meaningful, while according full review to all who have the money to pay their own way. This, however, is not an appeal but the drafting of a new original petition for habeas corpus to the higher court. That new petition must reflect what had transpired in the Superior Court. The statute provides:[1]

> "Every application for a writ of habeas corpus must be verified, and shall state whether any prior application or applications have been made for a writ in regard to the same detention or restraint complained of in the application and if any such prior application or applications have been made, the later application must contain a brief statement of all proceedings had therein, or in any of them, to and including the final order or orders made therein, or in any of them, on appeal or otherwise."

It is argued that since petitioner attended the hearing in the Superior Court, he can draw on his memory in preparing his application to the appellate court. And that court, if troubled, can always obtain the transcript in the lower court.[2] But we deal with an adversary sys-

---

[1] Calif. Penal Code § 1475.

[2] Rule 61, California Rules of Court provides:

"When a petition for a writ of habeas corpus is filed in a reviewing court, seeking the release from custody of one who is confined

tem where the initiative rests with the moving party. Without a transcript the petitioner, as he prepared his application to the appellate court, would have only his own lay memory [8] of what transpired before the Superior Court. For an effective presentation of his case he would need the findings of the Superior Court and the evidence that had been weighed and rejected in order to present his case in the most favorable light. Certainly a lawyer, accustomed to precise points of law and nuances in testimony, would be lost without such a transcript, save perhaps for the unusual and exceptional case. The lawyer, having lost below, would be conscious of the skepticism that prevails above when a second hearing is sought and would as sorely need the transcript in petitioning for a hearing before the appellate court as he would if the merits of an appeal were at stake. A layman *a fortiori* needs the transcript even more.

It is said that the appellate court may send for the transcript and deduce from it whether there is merit in this new application for another hearing. That philosophy would make the appellate tribunal *parens patriae* of the indigent habeas corpus litigant. If that would suffice for appellate hearings in habeas corpus, why not in review of cases on appeal? Since our system is an adversary one, a petitioner carries the burden of convincing the appellate court that the hearing before the lower court was either inadequate or that the legal

---

under the process of any court of this State, and the court, before passing on the petition, desires to obtain information concerning any matter of record pertaining to the case of such person, it may order the custodian of the record to produce the same or a certified copy thereof to be filed with the clerk of the reviewing court."

[8] While petitioner had assigned counsel at the hearing before the Superior Court, that assignment did not cover the preparation of papers in further pursuit of relief.

conclusions from the facts deduced were erroneous. A transcript is therefore the obvious starting point for those who try to make out a case for a second hearing. The State can hardly contend that a transcript is irrelevant to the second hearing, where it specifically provides one, upon request, to the appellate court and the State attorney. So long as this system of repeated hearings exists and so long as transcripts are available for preparation of appellate hearings in habeas corpus cases, they may not be furnished those who can afford them and denied those who are paupers.

There is no suggestion that in the present case there is any adequate substitute[*] for a full stenographic transcript. We conclude that in the context of California's habeas corpus procedure denial of a transcript to an indigent marks the same invidious discrimination which we held impermissible in the *Griffin* and *Long* cases where a State granted appeals in criminal cases but in practical effect denied effective appellate review to indigents.

Reversed.

MR. JUSTICE BLACK concurs in the judgment of reversal and all of the Court's opinion except the part which appears on page 4. He is of the opinion that, as stated in *Griffin* v. *Illinois*, 351 U. S. 12, there may be no necessity for a full stenographic transcript in California habeas corpus cases, and for that reason would not automatically require the State to supply one in cases like this case.

---

[*] Cf. *Griffin* v. *Illinois*, 351 U. S. 12, 20.

SUPREME COURT OF THE UNITED STATES

No. 73.—October Term, 1968.

Robert Newton Gardner, Jr., Petitioner, *v.* State of California.	On Writ of Certiorari to the Superior Court of California, County of San Luis Obispo.

[January 20, 1969.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, dissenting.

The Court holds today that petitioner, whose application for a writ of habeas corpus was denied in the California Superior Court, is automatically entitled to a free transcript of that proceeding, to aid him in "preparing" and "presenting" an entirely new application in the State Supreme Court. In so holding, the Court not only misconceives the nature of California's post-conviction procedure, but it imposes on the State a financial burden which is not offset by any appreciable benefit to the petitioner.

Under § 1475 of the California Penal Code, an applicant denied habeas corpus relief in a lower state court may file an application *de novo* in a higher court. As the Superior Court below noted, the petition is self-contained and independent of the prior proceeding. (Appendix 43.) The applicant is neither required nor requested to assign errors, or refer to testimony, in the prior proceeding. He must only inform the court that such a proceeding took place, and supply collateral data, such as the court in which it was held, the disposition, etc.[1] The initial question for the second court—as it is for

[1] See Form for Petition for Release From or Modification of Custody, as amended effective November 11, 1966, approved by the Judicial Council of California for use under Rules 56.5 and 201 (f) of the California Rules of Court.

any court examining an application for post-conviction relief—is whether, taking the factual allegations as proved, the application states a claim upon which relief can be granted. If the court determines that a claim is stated, it will order a referee to conduct an independent evidentiary hearing.[1]

Certainly there can be no constitutional requirement that a court hear, or review the transcript of, testimony in support of factual allegations which, even if proved, would not constitute grounds for relief.[2] Cf. *Draper* v. *Washington*, 372 U. S. 487, 495–496 (1963). Nor will a transcript of a prior habeas corpus hearing materially aid the applicant in framing the allegations in a subsequent petition. To be sure, a transcript of the prior hearing may be an incidental convenience—so, too, would a daily transcript at a criminal trial—but the Fourteenth Amendment does not require a State to furnish an indigent with every luxury that a wealthy litigant might conceivably choose to purchase. Cf. *id.*, at 496.

Neither *Long* v. *District Court*, 385 U. S. 192 (1966), nor any other decision of this Court, suggests that California's procedure is constitutionally defective. The State in *Long* simply made "no provision [on an appeal from the denial of habeas corpus] . . . for the furnishing

[1] Under Rule 60 of the California Rules of Court, *ante*, at 2, n. 4, the court may also order the transcript of the earlier proceeding.

[2] In this connection, it is worth noting that petitioner's affidavit in support of his motion for a free transcript stated that the Superior Court ruled against him "not on the facts of his claims, but as to the interpretation of rights secured by the Fourteenth Amendment." (Appendix 41–42.) The State Supreme Court apparently reached the same conclusion as the lower court, and denied petitioner's subsequent application for a writ of habeas corpus on the merits. I express no view on the merits of petitioner's claims, which are the subject of petitions for certiorari pending this Term in *Gardner* v. *California*, No. 7, Misc., and *Gardner* v. *California*, No. 10, Misc.

of a transcript without payment of fee . . . ," or for an independent evidentiary hearing at the appellate level. For all practical purposes, an indigent could not effectively obtain review.[4] In contradistinction, the California indigent who alleges facts which entitle him to relief is afforded the same opportunity as any other applicant to prove those facts.

In purpose and effect, California's procedure is not dissimilar to the federal rule whereby an indigent appealing the denial of an application for collateral relief is provided a transcript only if "the trial judge or a circuit judge certifies that the . . . appeal is not frivolous and that the transcript is needed to decide the issue presented by the . . . appeal." 28 U. S. C. § 753 (f). Both the state and federal procedures are responsive to the immense volume of frivolous habeas applications and appeals filed in the respective systems. Both procedures are sensible and practical. Both are equitable and fair.

I would affirm.

---

[4] Similarly, *Smith* v. *Bennett*, 365 U. S. 708 (1961), held it impermissible for a State to condition docketing of a habeas corpus application or allowance of an appeal on the payment of a filing fee; and *Lane* v. *Brown*, 372 U. S. 477 (1963), held invalid a procedure under which an appeal from the denial of *coram nobis* could be perfected only by filing a transcript in the appellate court, when it was within the public defender's exclusive discretion whether or not to request that a free transcript be prepared. The distinctions between these cases and the instant one are too obvious to merit discussion.